Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
	)	

TO: WIRELINE COMPETITION BUREAU

COMMENTS OF THE ALLIANCE FOR FAIR POLE ATTACHMENT RULES

American Electric Power Service Corporation
Duke Energy Corporation
Entergy Services, Inc.
Florida Power & Light Company
Progress Energy
Southern Company

Sean B. Cunningham
Vanessa A. Colón
Hunton & Williams LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel to the Alliance

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UNITED STATES OF AMERICA
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COMMENTS

Pursuant to sections 1.415 and 1.419[1] of the Federal Communications Commission's ("FCC" or "Commission") rules, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (collectively hereinafter "the Alliance for Fair Pole Attachment Rules" or "the Alliance"), by their counsel, hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceedings seeking comment on issues relating to the Commission's implementation of section 224.[2]

EXECUTIVE SUMMARY

The Commission's Further Notice of Proposed Rulemaking ("FNPRM") makes numerous findings and conclusions. It also proposes numerous rule changes. The Alliance for Fair Pole Attachment Rules ("the Alliance") supports several of the FNPRM's core findings, but

[1] 47 C.F.R. §§ 1.415 and 1.419 (2009).

[2] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84, (2010), as corrected on August 3, 2010, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Proposed Rule; Correction, FCC 10-84 (2010) (hereinafter "Order and FNPRM" or "FNPRM").

disagrees with the FNPRM's proposed rules to the extent they are at odds with those core findings. Specifically, the Alliance supports the following core findings in the FNPRM:

- Electric utilities are "typically disinterested parties with only the best interest of the infrastructure at heart" and that, by contrast, existing attaching entities that are in "direct competition" with new attachers "may have strong incentives to frustrate and delay attachment."[3]

- "[N]o single set of rules can take into account all the issues that can arise in the context of a single installation or attachment."[4]

- Applying different rates for cable systems and telecommunications carriers—*within the meaning of those terms under section 224*—potentially "distorts attachers' deployment decisions" and, accordingly, rates should be as "close to uniform as possible, consistent with [s]ection 224…."[5]

The Alliance offers a positive approach to Federal pole attachment regulation that is consistent with these findings. In stark contrast to the Alliance's approach, the FNPRM's proposed rules are almost entirely at odds with the core findings identified above.

The Alliance's Recommendations. Consistent with the findings identified above, the Alliance proposes that the Commission, rather than mandating a "single set of rules," should leave the details of access and make-ready to the negotiations of the private parties and, consistent with its limited authority under section 224, continue to hear and resolve complaints on a case-specific basis. The Commission also should clarify that the applicant has the primary responsibility for "coordinating" the make-ready process. To the extent new applicants are subjected to anticompetitive delaying tactics by their competitors who already have negotiated pole access with the pole owner, the Commission should direct its enforcement powers not

[3] *Id.* at para. 68.

[4] *Id.* at para. 24.

[5] *Id.* at para. 115.

against disinterested electric utilities, but instead against precisely those "incumbent" attachers who have a known incentive to "frustrate and delay" their competitors' access.

Regarding uniform rates, the Alliance urges the Commission to adopt proposals previously filed by Alliance members and the Edison Electric Institute ("EEI"). In essence, the Commission should apply the statutory telecom rate to all competitive broadband providers that are subject to the Commission's pole attachment jurisdiction (i.e., all cable systems and competitive local exchange carriers ("CLECs") that provide broadband or other "telecommunications" services). In its rate calculations, the Commission should continue to include all expenses and capital costs associated with the pole. It should also modify the presumptions used in the cost-allocation formula to better reflect reality "in the field" and, thereby, mitigate the inherent subsidy effect of the telecom rate. The Commission should continue its "current approach" to the regulation of incumbent local exchange carrier ("ILEC") attachments on electric poles—which is not to regulate them at all.

FNPRM Proposals. In stark contrast to the Alliance's recommendations, the FNRPM does precisely the opposite of what the Commission's own findings warrant: it focuses almost exclusively on pole owners, without distinguishing between electric utilities (who have only the best interests of their own "infrastructure at heart") and ILECs (who "can make no such claim"). The FNPRM's proposed rules not only contradict the Commission's own premises, but also represent sweeping, radical changes to its existing rules. These proposals far exceed the Commission's well-defined section 224 authority to "hear and resolve complaints" and contradict expressly delineated statutory cost allocation formulas. The proposed changes also abruptly depart from decades of prior policy without factual justification. Three aspects of the

FNPRM are especially troublesome to the Alliance: make-ready, enforcement, and attachment rates.

Make-Ready. Specifically, the Commission now proposes to replace its established case-specific approach to access and make-ready disputes with rigid general rules and timelines that contradict the agency's repeated findings regarding the inherently "fact-intensive" nature of such disputes. More fundamentally, the FNPRM would impose on electric utilities a host of new responsibilities that are foreign to their core duties as public utility electricity providers and that, in effect, require the utility to act as traffic cop and one-stop-shop for implementing the make-ready portion of the applicant's business plan. Specifically, with no statutory warrant, the FNPRM would:

- subject utilities to rigid timelines;
- impose on utilities new notice, scheduling, and coordination requirements;
- require utilities to *physically move* existing communications facilities when the owners of those facilities refuse to make room for their potential broadband competitors;
- mandate that utilities disclose "common" make-ready charges, despite the fact that such charges are inherently case-specific and proprietary;
- commandeer the utility to serve as the "clearinghouse" for the administration of attachment transfers;
- compel electric utilities to allow non-electric-qualified workers to work "among" the electric power lines; and
- require utilities to establish and maintain, apparently at their own expense, a massive "national database" of the location and availability of all poles, ducts, conduits, and rights-of-way (regardless of which, if any, of those poles or other facilities are the subject of specific access requests).

Enforcement. Without a shred of statutory support, the FNPM proposes to assess "compensatory damages" against the *electric* utility, *not* against the entities that have a known incentive to frustrate and delay access by their broadband competitors. Additionally, at the same

time the utility is subjected to rigid new timelines, the applicant-complainant is *relieved* of any ascertainable time constraints on filing complaints and calculating refund amounts.

Rates. The FNPRM's proposed low-end rate bears almost no resemblance to the statutory telecom rate. The low-end approach would essentially eviscerate the cost basis of the telecom rate and replace the statutory cost-allocation mechanism with a spurious "cost causation" principle that contradicts three decades of Commission policy. Consistent with the plain text of the statute, the Commission has always allowed the utility to recover its actual, historical capital costs in pole attachment rates. Now, at precisely the moment when the FNPRM proposes to assign a host of new administrative and data-processing duties to utilities (apparently at cost), the FNPRM proposes to slash the costs utilities may recover in annual pole rental rates. This "low-end" rate is aptly named: it could, the FNPRM admits, result in rates *lower* than the historic cable rate. It appears that the FNPRM proposes to apply this upside-down "telecom" rate not only to cable systems and CLECs, but also to pole-owner ILECs, despite the plain text of the statute and the Commission's longstanding affirmation that "*the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[6]

DESCRIPTION OF THE ALLIANCE

The Alliance is comprised of six companies that, collectively, serve electric consumers in 18 states and numerous metropolitan areas and own and maintain approximately 17.6 million electric distribution poles. The Alliance companies serve 12 of the 30 states in which pole attachments are regulated by the FCC.[7]

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[6] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) ("1998 Report and Order").

[7] The Alliance's member companies serve the following FCC-regulated states: Alabama, Florida, Georgia, Indiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee,

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly-owned subsidiary of American Electric Power Company, Inc ("AEP"). AEP Service Corp. is a supplier of administrative and technical support services to AEP and its subsidiaries. AEP is one of the largest investor-owned electric utilities in the United States with more than 5 million customers linked to its state electricity transmission and distribution grid covering 197,500 square miles. AEP, through its operating company subsidiaries, owns and operates critical electric distribution infrastructure in eleven states across the Midwest and Southeast: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.

Duke Energy Corporation ("Duke Energy") is one of the largest electric power holding companies in the United States. Its regulated utility operations serve approximately 4 million customers located in five states in the Southeast and Midwest, representing a population of approximately 11 million people.

Entergy Corporation is an integrated energy company engaged primarily in electric power production and retail distribution operations. Entergy Services, Inc. ("Entergy") joins these comments acting as agent on behalf of Entergy Arkansas, Inc., Entergy Mississippi, Inc., Entergy Texas, Inc., Entergy New Orleans, Inc., Entergy Louisiana, LLC, and Entergy Gulf States, LLC, which combined serve approximately 2.7 million customers in Arkansas, Louisiana, Mississippi, and Texas.

Florida Power & Light Company ("FP&L") is an integrated electric utility primarily engaged in the production, transmission and distribution of electric power within a service territory covering approximately 27,650 square miles in Florida, where it serves approximately 4.5 million customers.

Texas, Virginia, and West Virginia. *See States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, "Public Notice", DA 10-893 (2010).

Progress Energy, headquartered in Raleigh, N.C., includes two major utilities that serve more than 3.1 million customers in the Carolinas and Florida. The distribution plant consists of 2.3 million poles with joint use attachments on over one million of those poles. Progress Energy currently has 73 attachment agreements with cable, CLEC, and ILEC companies that have made 1,385,518 attachments on poles.

Southern Company is one of the largest generators of electricity in the nation, serving both regulated and competitive markets across the southeastern United States. Southern Company, through four retail operating companies, supplies energy to approximately 4.2 million customers in a 120,000 square-mile service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida.

Each of the Alliance's members owns or controls poles in states that are governed by the FCC's pole attachment authority and, as such, are vitally interested in issues affecting the integrity and use of their electric plants for communications purposes.

I. MAKE-READY AND ACCESS

An investor-owned electric utility is not a landlord, a bank, or a "clearinghouse." It is a public utility that has an obligation to provide safe, reliable electricity service at just and reasonable rates pursuant to state laws. As investor-owned entities, such utilities are also accountable to their shareholders to devote their assets and facilities to purposes that will yield a fair return on equity. Electric utilities can, and do, permit nondiscriminatory access on just and reasonable rates, terms, and conditions to a variety of third-party attachers.

As the Commission has consistently and forcefully affirmed and reaffirmed for the past three decades, whether access is "nondiscriminatory" or terms and conditions are "just and reasonable" is inherently a fact-intensive, case-specific matter. The FNPRM itself "reaffirm[s]"

that "no single set of rules can take into account all the issues that can arise in the context of a single installation or attachment."[8]

However, in defiance of all precedent and prudence, the FNPRM now proposes the opposite approach: a comprehensive, rigidly rule-based, regulatory regime requiring the electric utility to serve as "managing utility." As "administrator" of the third-party attachment process, the utility would be expected, in effect, to act as agent and advocate for the applicant, bursar and paymaster for competing communications attachers, and ombudsman and overseer for all participants in the make-ready process.

This entire approach—commandeering the resources of the utility to implement the business plan of the applicant and the policy agenda of the Commission—is wholly outside the scope of an electric utility's responsibilities as a public utility, wholly in excess of the utility's duties under section 224, and wholly contradictory to the Commission's long-standing case-specific approach to make-ready and access disputes.

The Alliance urges the Commission to adopt a better approach to make ready. Specifically, the Commission should:

- Leave the details of the make-ready process to private parties, who already have the tools and capabilities to complete make-ready work in a timely manner, consistent with the electric utilities' responsibilities as a public utility.
- Continue to hear and resolve disputes on a case-by-case basis, as befits the variability and fact-specific nature of make-ready disputes.
- Where existing communications attachers seek to frustrate and delay access by their potential competitors, regulate those bad actors directly through the Commission's ample enforcement powers under the Communications Act, not by proxy through spurious mandates on electric utilities.

[8] Order and FNPRM at para. 24.

A. Make-Ready Timeline and Facilities Rearrangement Mandate

To promote timely access to poles, the FNPRM proposes a new rule establishing a comprehensive timeline for completion of make-ready work within a specified period of as few as 105 days. The Alliance understands the "importance of timely access to poles."[9] To facilitate such access, the Alliance proposes a constructive alternative to the Commission's proposed timeline. The Alliance's alternative approach would help achieve the Commission's policy goals by addressing the failure of incumbent attaching entities to make room for their potential competitors by rearranging their facilities in a timely manner. The Alliance's approach would be simpler to administer than the FNPRM's proposed timeline, take into account the complexity and variability of the make-ready process, and be consistent with the Commission's statutory authority. The Alliance objects to the FNPRM's proposed timeline because it would be an arbitrary and capricious departure from the Commission's long-standing case-by-case approach to make-ready disputes and would exceed the Commission's authority under section 224. For the reasons set forth below, the Alliance urges the Commission to adopt the Alliance's alternative approach instead of the proposed timeline.

1. A more successful approach to timely completion of make-ready would combine flexibility and disincentives for delay by parties that cause delays.

The FNPRM acknowledges that its make-ready regulations should address utilities' concerns about "possible operational or logistical challenges or the need to respond to factors outside their control."[10] As explained below, a one-size-fits all timeline is impracticable and exceeds the Commission's authority. A better approach would be for the Commission to supplement its established case-by-case approach with regulations to facilitate the applicant's use

[9] *Id.* at para. 17.

[10] *Id.* at para. 46.

of third-party contractors and induce existing attaching entities to "make room" for their competitors by rearranging their facilities in a timely manner. The Alliance's alternative approach which would achieve the Commission's policy goals more effectively while providing adequate flexibility for electric utilities. The proposed alternative would also comport with the Commission's statutory authority under section 224 and the Communications Act as a whole.

a. Negotiated agreements should always come first.

Negotiated agreement should always precede mandated action and resort to Commission regulations. Rather than comply with one-size-fits-all templates, the parties should always be free to negotiate the rates, terms, and conditions for pole attachment agreements. In the event of disputes, negotiated settlement should remain the norm. The Alliance supports the Commission's continued "endorse[ment of] negotiated agreements"[11] and agrees that "[w]hen a complaint is filed, negotiated agreement remains the quickest and least burdensome way for parties to resolve disputed terms of access."[12] Pole attachment agreements are negotiated as a "package deal." Individual terms and conditions should not be evaluated in abstraction from the whole. Uniform timelines and other mandates can "short-circuit" the negotiation process and simply lead to more disputes.

b. The Commission should clarify that the applicant has the primary responsibility for initiating and coordinating the make-ready process.

If new applicants seek timely access to utility poles, those new applicants must accept primary responsibility for initiating and coordinating the make-ready process. An "entitlement mentality" whereby the new applicant simply expects the utility to grant access in a timeframe that best suits the applicant's business plan, and then complains when circumstances beyond the

[11] *Id.* at para. 23.

[12] *Id.*

utility's control require additional time, can only be counterproductive. Accordingly, to facilitate prompt completion of make-ready, the Commission should clarify that the applicant has the primary responsibility for: coordinating rearrangement of existing attachments as needed to make room for its attachments; notifying existing, third-party attachers that they must transfer their facilities within a specified time-frame; securing the necessary rights-of-way for communications equipment; and, to the extent consistent with the utility's safety requirements and other attachment policies, performing surveys and construction work.

Applicants are solely responsible for the timely completion of their projects. Many applicants are skilled and capable of handling their pre-planning and route selection. If they encounter obstacles in their pre-planning (such as a particularly expensive or a potentially time consuming pole with make-ready involving primary clearance or other problems) they simply re-route aerially to a non-make-ready route or bury their facilities by trenching or directionally boring conduits underground (a now-common technique nation-wide) for routing their facilities underground. In many such cases, the re-routing or burial of their cable is less costly and more expeditious than undertaking make-ready.

The Alliance urges the Commission to give significant attention to the fostering of responsible applicant pre-planning and route design, with the assistance of pole owners, where needed, as a refreshing alternative to its belaboring of unworkable micro-management solutions to pole attachment permit process problems that in some cases do not even exist.

c. Third-party contractors can supply the tools and services needed to complete the make-ready process in a timely manner.

Working within attachment policies set forth by the utility, third-party contractors can provide the tools needed to guide the applicant through the make-ready process and perform the necessary surveys, coordination, rearrangements, and construction work. All work performed

would have to be in compliance with the utilities' applicable policies. The applicant and the third-party contractor, based on the local circumstances, the utility's requirements, and the contractors' own experience, would negotiate a time-frame for make-ready completion. Complaints about whether a particular utility policy is just and reasonable would be addressed on a case-by-case basis as needed. Failure by the third-party contractor would be a contractual matter between the applicant and the contractor.

d. To the full extent of its authority under the Communications Act, the Commission should require existing attaching entities under its jurisdiction to transfer their facilities in a timely manner.

The FNPRM preamble asserts that the obligation to complete make-ready work in a timely manner extends "not only to the utility, but also to the existing attachers."[13] However, the text of the proposed rule uses mandatory language only with respect to utilities—no obligations on existing attaching entities are clearly specified.[14] In fact, under the proposed rule, the only consequence for an existing attacher that fails to move its facilities in a timely manner to make room for a new competitor is that the pole owner is then compelled to move the existing attacher's facilities instead. Thus, the FNPRM has it backwards, placing the entire obligation on the utility, rather than on the party that is causing the problem.

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[13] *Id.* at para. 41.

[14] Proposed rule 1.1420 provides that, "[i]f make-ready work is not completed by any other attaching entities as required by paragraph (d) above, the utility or its agent shall complete all necessary make-ready work." Order and FNPRM at Appendix B, proposed rule 1.1420(e) (emphasis added). Although subsection (e) references a "require[ment]" of the existing attaching entity to complete its portion of the make-ready work, the referenced subsection (d) does not actually require the existing attacher to do anything. Subsection (d) only requires the *utility* to notify existing attachers and to "specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity." *Id.* at Appendix B, proposed rule 1.1420(d). In effect, the proposed rule would make the utility solely responsible for completion of make-ready work and includes no provision for extension under any circumstances beyond the maximum 149-day deadline.

Rather than requiring electric utilities to transfer attached communications facilities to make room for new communications attachers, the Commission should directly require the cable and ILEC owners of those communications facilities to move such facilities themselves. As the FNPRM recognizes, existing attaching entities that are in the broadband business have a powerful *dis*incentive to cooperate with new broadband market entrants by making room for the attachments of those new entrants in a timely manner. Indeed, such incumbent broadband providers have an incentive to "frustrate and delay" such access.[15] By contrast, electric utilities have no commercial incentive to obstruct access. As the FNPRM notes, electric utilities are "typically disinterested parties with only the best interest of the infrastructure at heart."[16]

As explained below, the Commission has no authority to regulate attachments that are not under the Commission's jurisdiction or are not in dispute. Also, outside of section 224, the Commission has no authority over electric utility pole owners. However, by contrast to its limited authority under section 224, the Commission has broad authority over ILECs, cable systems, telecommunications carriers, and communications providers generally under the Communication Act. The Commission also has an obligation to use its statutory authority to "remove barriers" to competition in local markets for advanced telecommunications services.[17]

Many possible tools for compelling existing communications attachers to make room for their competitors promptly are at the Commission's disposal. For example, under sections 251 and 271, telecommunications carriers are required to provide non-discriminatory access to

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[15] Order and FNPRM at para. 68.

[16] *Id.*

[17] Section 706(a) of the 1996 Act requires the Commission to: "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing … measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302.

network elements and rights-of-way.[18] More generally, section 208 provides authority for filing complaints against common carriers. Furthermore, although the Commission has no compensatory damages authority under section 224, the Commission may award such damages against "common carriers" under section 206. In any event, the Alliance is confident that the Commission can devise an appropriate remedy to address incumbent attaching entities' anticompetitive efforts to "frustrate and delay" new market entrants rather than attempting to regulate by proxy through new mandates on electric utilities.[19]

e. The Commission should clarify that it is just and reasonable for a utility, at its discretion, to include in its attachment agreement with a jurisdictional pole attacher a provision allowing the utility to transfer existing attachments for a fee.

As explained below, the Commission lacks authority to compel an electric utility to move the facilities of existing attaching entities. Even if the Commission had such authority (and it does not), utilities typically lack authority to transfer such facilities because their existing attachment agreements make no provision for the utility to take such action or because of other applicable restrictions. Also, electric utility workers typically do not have (or need) the same skill sets as communications line workers. Nevertheless, where the electric utility is otherwise permitted under applicable laws and regulations to move other parties' communications

[18] *See, e.g.,* 47 U.S.C. § 251(b)(4) (providing that local exchange carriers have "the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title"); and 47 U.S.C. § 251(c)(6) (stating that local exchange carriers have "The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier…").

[19] The Alliance, as a group of electric utilities, does not presume to instruct the Commission on the scope of its enforcement powers with respect to communications providers under the Communications Act generally. If, however, the Commission is correct that existing communications attachers have an incentive to "frustrate and delay" their potential competitors, the Alliance believes the Commission is both competent and obligated to devise an appropriate remedy for such anti-competitive behavior.

facilities, and chooses to devote the resources needed to transfer communications lines safely, it should have the option of doing so.

To facilitate this option with respect to section 224-jurisdictional attachments, the Commission should clarify that it is just and reasonable for an electric utility to include in its pole attachment agreement, as a term or condition of attachment, a provision allowing the utility to move the attacher's facilities upon request by an applicant. The Commission should further clarify that the utility is entitled to charge the applicant for the entire costs of such transfer (including contract labor, materials, and associated administrative expenses) plus a reasonable transfer fee. The utility's recoverable costs should also include the cost of any liability insurance needed to hold the utility harmless for damages incurred by the attaching entity as a result of the utility's transfer. The utility should also be released from any damages provided it does not undertake the rearrangement in a reckless manner.

2. Assuming, *arguendo*, that the Commission has authority to adopt a timeline, the timeline should be revised to provide for greater flexibility and appropriate exclusions for circumstances beyond the utility's control.

The FNPRM seeks comment on "any necessary adjustments or exclusions from the timeline proposed above."[20] Should the Commission proceed to adopt a timeline despite its lack of authority to do so, the Alliance urges the Commission to make certain adjustments and exceptions to the timeline to take into account varying circumstances.

a. The timeline should not apply to any work that is not under the jurisdiction of the Commission, e.g., pole replacement.

The FNPRM states that the Commission's make-ready timeline proposal "incorporate[s]" the Coalition of Concerned Utilities' request to exclude "pole replacement" from the timeline

[20] Order and FNPRM at para. 46.

requirement. The Alliance strongly supports this exclusion and notes that applying the timeline to pole replacements would only discourage utilities from granting access in case where pole replacement is necessary. However, the text of proposed rule does not expressly exempt pole replacement from the requirement or otherwise distinguish at all between pole replacement and make-ready that does not involve pole replacement. Proposed rule 1.1420 refers repeatedly to either "all necessary make-ready work," "all make-ready work," "make-ready work," or simply "make-ready."[21] Footnote 37 of the Order accompanying the FNPRM purports to define "make-ready" as "any rearrangement of equipment and attachments in order to make room on either an existing pole or a new, different pole for a new attacher." If the term "make-ready" as used in the proposed timeline rule has the same definition, the timeline rule by its terms in fact would apply to pole replacements. This matter must be clarified by providing for an express exemption for projects involving pole replacement.

b. The timeline requirement should apply only as a rebuttable presumption.

In addition to specific adjustments and exclusions discussed below, it should be clarified that the timeline, both as a whole and with respect to its several elements, is binding on the utility only as a rebuttable presumption. Just as the utility has the option of showing that various presumptions in the Commission's pole attachment rate formulas do not correspond to actual conditions in the field, so the utility should have the opportunity to show that the timeline restrictions do not reasonably apply in a given set of circumstances.

[21] The rule also references the "obligations in section 1.1403(b)." The proposed change to 1.1403(b) refers to a "grant of access conditioned on performance of make-ready." *Id.* at Appendix B, proposed rule 1.1403(b).

c. The timeline should be clarified to confirm that the utility has a right to deny access within 45 days where rearrangement of existing facilities would be needed to provide sufficient capacity.

The Alliance agrees with the Commission that, as held by the Eleventh Circuit, electric utilities "are not obligated by statute to replace poles that are full to capacity." The Commission should confirm that "lack of capacity" includes a situation in which rearrangement of the existing attachments is needed to provide sufficient additional capacity to "make room" for the new attachment and that, in such situation, an electric utility has the right to deny access within the specified 45-day period.[22]

d. The timeline should not apply to the utility where the applicant has engaged a third-party contractor.

In the event the applicant has engaged a third-party contractor to perform the survey, rearrangement, or construction work, the agreement between the contractor and the applicant should establish the timeline, subject to the utility's supervision and approval.[23] Where the private parties have agreed to a timeline, the utility should not be bound by a separate FCC timeline.

e. When access is denied, the timeline "clock" should stop immediately.

It should also be clarified that, where access is denied, the timeline stops immediately upon notice of denial. Proposed rule 1.1420(c) directs the utility to tender an offer to perform all

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[22] *See Southern Co. v. FCC*, 293 F.3d 1338, 1347 (11th Cir. 2002) (holding that "[s]ection 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.' 47 U.S.C. § 224(f)(2)").

[23] For reasons of safety and reliability, the utility must always retain the right to supervise and approve all aspects of make-ready. Complaints concerning supervision of third-party contractors should be addressed on a case-specific basis rather than being subject to a one-size-fits-all timeline. See discussion of third-party contractors below.

necessary make-ready work "[w]ithin 14 days of providing a survey as required by section 1.1420(b)." This rule, on its face, would require the utility to tender an offer even where access is denied. The rule should be clarified to show that the utility has no further obligations under the timeline once access has been denied.

f. The timeline should provide for additional time on a case-specific basis for any especially large or complex requests.

Fourth, the Commission should revise the rule to allow a utility additional time to complete a survey in cases of requests that will require pole replacement or otherwise involve a large *or complex* request. The utility should have discretion to determine when additional time is needed. Any cookie-cutter approach based on a specific number or percentage of poles fails to take into account the fact-specific nature of make-ready.[24] Any request that requires pole replacement could involve complicating factors. The utility should have the discretion to determine when the request is too large or complex to complete within the presumptive timeline. Especially large or complex requests should be negotiated individually rather than being subject to a rigid timeline.

g. The timeline "clock" should stop in the event of circumstances beyond the utility's reasonable control.

The FNPRM specifically seeks comment on whether the Commission should establish guidelines for "stopping and restarting the clock" under such circumstances.[25] The Alliance

[24] A threshold based on a percentage of poles would be unworkable considering the enormous number of distribution poles owned by individual electric utilities. For example, several of the Alliance companies individually own the following numbers of distribution poles: AEP (combined operating companies)—5.1 million; Duke Energy (combined operating companies) 2.9 million; Entergy (combined operating companies)—3.2 million; FP&L—1.1 million; Progress Energy (Carolinas and Florida operating companies)—2.1 million; Southern Company (combined operating companies)—3.1 million; Georgia Power Company (operating company subsidiary of Southern Company)—1.3 million.

[25] Order and FNPRM at para. 51.

urges the Commission to clarify that, in case of a circumstance beyond the utility's control, the "clock" should stop and should not start again until such circumstance is resolved. The Alliance strongly agrees with the Commission that "circumstances beyond a utility's control may require prioritization, or otherwise warrant interrupting the timeline."[26] An electric utility's first priority is to provide electric power service to its customers in a safe and reliable manner at just and reasonable rates. Electric utilities are subject to service obligations, rate regulation, accounting standards, safety and reliability requirements under state and local laws and regulations, industry codes and standards, and labor agreements. Electric utilities are also bound by existing contractual obligations with both FCC-jurisdictional and non-FCC-jurisdictional attaching entities. Electric utilities are not at liberty to disregard these requirements and obligations to accommodate the convenience of prospective attaching entities.

(i) Whether a circumstance is beyond the utility's control should be determined on a case-specific basis.

Accordingly, the Alliance urges the Commission to clarify that "circumstances beyond the utility's control" is not limited to natural disasters or other forces majeure, but includes a variety of other circumstances in which it would not be reasonable to require the utility adhere to a strict timeline. In general, the Commission should evaluate such circumstances on a case-specific basis in the context of particular disputes.

(ii) In addition to fact-specific determinations, the Commission should provide a "safe harbor" for certain categories of circumstances.

In addition to fact-specific circumstances, the Commission should clarify that "stopping the clock" is warranted for any of the following reasons:

[26] *Id.*

- Failure of existing attachers to act in a timely manner. The make-ready timeline should not be enforced against the electric utility where an existing attaching entity fails to transfer its facilities in a timely manner to make room for the applicant. In particular, the timeline should not apply where an attachment agreement does not provide for transfer of facilities by utility or the new applicant refuses to indemnify the utility for liabilities arising from transfer of third-party facilities.

- Safety and reliability. Under section 224(f)(2), the utility has the right to deny access for reasons of safety or reliability. This right is not time-limited. If, at any time before or during the make-ready process the utility identifies a safety issue related to the application, the timeline clock should stop. For example, safety violations by existing attaching entities may require correction before completion of make-ready. The Commission should also clarify that reliability includes both electric reliability and communications network reliability.[27]

- *Force majeure* and related circumstances. Extraordinary events beyond the control of the parties may threaten or damage the utility's infrastructure or otherwise require a "reprioritization" of the utility's resources which may, in turn, affect make-ready timing. Examples include, but are not limited to, hurricanes, storms, floods, volcanic eruptions, earthquakes, war, riot, or crime.

- Mutual assistance obligation to other utilities in need. All of the Alliance member companies, and typically investor-owned electric utilities across the nation, have agreements with other utilities committing to dispatch utility repair trucks, crews, and support personnel to assist with service restoration in the wake of a major storm or similar event.[28]

- Accident. Damage to poles caused by vehicle accidents, unauthorized digging, or other, similar incidents may affect make-ready in specific locations.

- Strike, work stoppage, or labor shortage. Any interruption in the availability of skilled contract labor or other labor must be resolved to complete the make-ready process.

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[27] Electric utilities should not be compelled to move or modify third-party communications wires and associated equipment within an arbitrary timeframe when doing so could result in a communications service outage for which the utility could then be held liable.

[28] For example, after hurricane Katrina, AEP sent crews to Florida from as far as Michigan. FP&L has sent crews from Florida to as far as Canada to assist with ice-storm recovery. Georgia Power sent crews to Alexandria, Virginia in the wake of hurricane Isabel. When called upon to provide assistance, an electric utility must reprioritize its resources. Both crews and engineering resources that may otherwise be used for make-ready are not available during these events.

- Union labor regulations. Some ILECs require the use of union labor, which sometimes results in delayed rearrangements or transfers.[29]

- Obligation under Federal, state, or local law. Potentially conflicting requirements include, but are not limited to, OSHA regulations, FERC reliability rules, state or local permitting requirements for new pole construction or transfer of existing facilities, and municipal work hour restrictions.

- Railroad restrictions. The transfer or modification of any communications or electric facilities that cross railroad rights-of-way typically require a permit from the railroad before completion. The railroad permitting process can add substantial additional time to the make-ready process.

- Right-of-way restrictions. A utility's right-of-way is typically restricted to activity related to electric service. Such rights-of-way do not necessarily include work on communications facilities or other third-party facilities not used for electric service. Unless and until an applicant can certify to the utility that it has secured the necessary rights-of-way for communications work, the timeline clock should not run.

- Unreasonable business risk. Under state laws, utilities are permitted to recover only "prudently incurred" costs in rates. Also, under the just and reasonable standard of section 224, utilities are not required to bear one-time make-ready capital costs for pole replacement. Accordingly, utilities should not be expected to commence make-ready until an applicant has paid for that make-ready or can satisfactorily complete a credit review or provide a deposit. Also, any entity that is in arrears on make-ready or pole rental charges or otherwise in breach of any term or condition of an existing contract should be presumed not to have submitted a "complete" application.

- Attachment agreement conflict. Existing attachment agreements may either include conflicting obligations or may not authorize the utility to take actions needed to complete

[29] For example, Progress Energy has transfer agreements in place with many of its third-party attaching communication companies. These agreements have allowed Progress to hire a communication line crew to transfer joint use attachments from one pole to the next in order to get rid of the old poles. One of Progress Energy's third-party attaching ILECs is the only company that refuses to allow Progress Energy's certified communication contractor to transfer their lines because the ILEC uses union labor and requires Progress Energy to provide 60 days advance notice so that the ILEC can send its union crews first. The ILEC has admitted that the ILEC crew is approximately twice the cost to do this work but cannot allow anyone but a union crew to touch their lines. This has slowed down Progress Energy's efforts to eliminate old stub poles. Similarly, Duke has previously approached an ILEC about establishing transfer agreements that would allow Duke to relocate ILEC facilities on specific types of jobs. The ILEC's response has consistently been that its union agreement with ILEC workers would not permit them to allow others to perform that work.

a facility transfer. For example, joint use agreements with ILECs sometimes do not allow the utility to transfer the ILECs facilities to a new pole.

- Unauthorized attachments. The timeline should not apply to any attachment request by a party that currently has unauthorized attachments on the utility's poles.

- Government attachments. Electric utilities typically have no authority over municipal street lights, municipal broadband networks, traffic cameras, state DOT facilities, Federal Homeland Security facilities, or other attached government facilities. Requiring the utility to move such attachments within a specific timeframe would conflict with laws and regulations governing such attachments.

- Government cannot pay for transfer. In some cases, the governmental entity has no authority to cover the costs of its own transfer nor is it budgeted to do so. Even if the new applicant is required to "reimburse" the government attacher for its transfer costs (assuming the government attacher is aware that it can seek reimbursement), the government entity may not have the ability to incur or otherwise "float" such costs even for a short period. This situation may give rise to a delay for which the utility should not be held responsible.

- Other contractual obligation. Any other contractual obligation that would interfere with the utility's ability to prioritize the applicant's request should stop the clock.

h. Stage 1 ("Survey") should be clarified.

The Alliance urges the Commission to make several clarifications to the proposed rule 1.1403(b).

(i) The Stage 1 rule should clarify that the utility has the right to determine what constitutes a "complete application."

The Alliance agrees with the FNPRM that a "request for access" includes a "complete application that provides the utility with the information necessary to begin to survey the poles."[30] The "details of the application process," including what constitutes a "complete application" should be left to the individual parties to negotiate. The Commission should clarify that it is just and reasonable for a utility to require that a "complete" application is free of material omissions or errors. An application without a pole attachment agreement already in

[30] Order and FNPRM at para. 35.

place is not a complete application. Also, proper insurance, proper bond, and other elements must be included in a complete application.

In response to the Commission's request for comment on whether a "lack of due care" by the applicant should "matter," the Alliance is concerned that "lack of due care" suggests a subjective, tort-style standard of care approach, which could result in endless disputes. The Alliance urges an objective standard: the application must be complete, i.e., it must include whatever information the parties determine is reasonably necessary to complete the application. If the language of tort must be used, the applicant should be strictly liable for submitting a complete application.

(ii) The Stage 1 rule should clarify that the utility is not required to complete the application for the applicant.

In response to the Commission's request for comment on whether a "lack of information that the utility could have provided" should "matter," the Alliance again urges the Commission to clarify that the *applicant* is responsible for ensuring that the *application* is complete. An attempt to adjudicate whether the utility "could" have provided such-and-such information would be a fruitless endeavor. In theory, a utility "could" provide many things to the applicant by taking on new administrative and data-processing responsibilities at the expense of the utility's own ratepayers, but it would be more appropriate for the applicant to bear such costs. The Commission should clarify that utilities are not required to provide any information that the applicant itself can and must provide to complete its application.

(iii) Any change made to the applicant's attachment proposal during Stage 1 should reset the clock.

If an applicant changes its attachment proposal while the utility is still conducting its engineering analysis, the utility is likely to require additional time to evaluate the proposal in the field. A substantially modified application should, accordingly, not be deemed a "complete"

application until the changes are completed and, upon completion of the application, the clock should be reset at the commencement of the Stage 1 time period.

i. Stage 5 ("Multi-Party Coordination") should be clarified.

(i) Stage 5 of the timeline should require existing attaching entities to move their own existing attachments in a timely manner to make room for new competitors.

The FNPRM preamble states that the Commission "propose[s] that the obligation to complete make-ready work in this timeframe extend not only to the utility, but also to existing attachers."[31] However, neither the text of the proposed rule nor the preamble includes any specific proposal to make such obligation binding on existing attachers. Accordingly, the proposed rule for Stage 5 should be modified as proposed above to make existing attaching entities—not the utility—responsible for moving existing communications facilities in a timely manner to make room for their competitors.

(ii) In preparation for stage 5, the applicant should be required to notify existing attaching entities and to certify to the utility that it has provided such notice.

In the experience of the Alliance companies, applicants often fail to notify existing attaching entities when facility rearrangement will be needed to make room for the applicant's facilities. Then, when the existing attachers fail to move their facilities in a timely manner, the applicant blames the utility for the resulting delay. To avoid this situation, the Commission should clarify that, unless the parties agree otherwise, it is the responsibility of the applicant to notify the existing attaching entities that they must transfer their facilities within a specified timeframe. The Commission should also require that, unless otherwise agreed, the applicant must certify to the utility that it has given such notice to the existing attachers.

[31] *Id.* at para. 41.

3. The proposed timeline rule is contrary to the plain language of, and exceeds the Commission's limited authorities under, the Pole Attachments Act.

Section 224 provides specific rights and obligations relating to a narrowly defined category of attachments and gives the Commission limited regulatory authority with respect to such attachments. The Commission has no regulatory authority over pole attachments other than the authority Congress has provided under section 224. The proposed make-ready timeline and facilities rearrangement mandate go far beyond the Commission's section 224 authority.

The proposed timeline and facilities rearrangement mandate contradict the plain language of section 224 and far exceed the Commission's authorities under the same. Specifically, the proposed rules: (a) exceed the Commission's authority under section 224 by compelling pole owners to transfer the facilities of entities whose attachments are not in dispute; (b) exceed the Commission's section 224 authority by regulating non-jurisdictional attachments and associated attachment agreements; (c) would violate section 224(f)(2) by requiring electric utilities to increase capacity; (d) would violate section 224(f)(2) by denying electric utilities a meaningful right to deny access for reasons of safety, reliability, and engineering; and (e) exceed the jurisdiction of the Commission to the extent such rules conflict with existing state regulations. In addition, with limited exceptions that do not apply to third-party attachment requests, the Commission has no authority to require electric utility pole owners to notify existing attachers that their attachments must be moved to accommodate new applicants.

a. The proposed rules would exceed the Commission's statutory authority under section 224 by regulating attachments that are not in dispute.

The proposed regulations would apply a rigid timeline that expressly requires the utility to take actions not only with respect to new attachments, but also with respect to existing, third-party attachments that are not in dispute. By extending its regulatory reach to undisputed

attachments, the Commission would exceed it statutory authority. Specifically, the Commission has no authority under section 224 to compel an electric utility to rearrange the existing facilities of third-party attaching entities. The Commission's regulatory authority over pole attachments is strictly limited to its authority under section 224(b)(1) to "hear and resolve complaints" concerning disputed rates, terms, and conditions of jurisdictional "pole attachments."[32] There is no default grant of authority to regulate electric distribution facilities or attachments to such facilities generally. The Commission's authority in a given case is limited to hearing and resolving a complaint relating to a specific set of pole attachments—i.e., those pole attachments that are the subject of the disputed pole attachment agreement. This limited authority does not extend to any third-party attachments or to the make-ready "process" as a whole. The proposed "comprehensive" timeline and facilities rearrangement mandate goes far beyond the bounds of the disputed attachment by resulting in a back-door regulation of attachments that are neither in dispute nor, in many cases, subject to the Commission's jurisdiction at all, as further explained below.

Section 224's grant of regulatory authority over pole attachments is further limited by the prescribed method of regulation. Specifically, section 224(b)(1) states that the Commission "shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[33] Any additional authorized actions by the Commission are strictly "for purposes of enforcing any determination" resulting from a complaint.[34] Section 224(e) further clarifies that the Commission's authority is limited to addressing disputes between

[32] 47 U.S.C. § 224(b)(1).

[33] *Id.*

[34] Section 224(b)(1) further specifies that the Commission is authorized to take appropriate actions, including issuing cease and desist orders, for purposes of enforcing determinations resulting from a complaint procedure adopted pursuant to the subsection. *See Id.*

the pole owner and the entity that makes a pole attachment over rates, terms and conditions when "the parties fail to resolve a dispute over such charges." Although the Commission is also to "prescribe by rule regulations to carry out the provisions of this section," such rulemaking authority is, on its face, limited to implementing the specific authorities granted under the "provisions of this section" (i.e., the authority to hear and resolve complaints).[35]

The legislative history of the Pole Attachments Act of 1978 makes clear that the Commission's authority is limited to attachments in dispute: "S. 1547, as reported, would empower the Commission to hear and resolve *complaints* regarding the arrangements between cable television systems and the owners or controllers of utility poles."[36] Indeed, even with respect to disputes, the Commission was intended to be the regulator of last resort:

> The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems *in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a state or more local regulatory forum is unavailable for resolution of disputes* between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. …[37]

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[35] 47 U.S.C. § 224(b)(2).

[36] S. Rep. 95-580, Report of the Committee on Commerce, Science and Transportation on the Communications Act Amendments of 1978, (November 2, 1977), 1978 U.S.C.A.A.N 109 at 110 ("S. Rep. 95-580") (emphasis added). *See also*, *Id.* at 123 (stating that "S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for CATV pole attachments are just and reasonable in any particular case."). Note that the bill that became law was H.R. 7442. H.R. 7442 was passed in lieu of S.1547, but only after it was amended to contain much of the text of S.1547.

[37] S. Rep. 95-580 at 123 (emphasis added).

The applicability of the Commission's regulations only to disputed attachments is expressly reiterated with respect to attachments subject to the telecom rate under section 224(e)(1), which directs the Commission to "prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications service, *when the parties fail to resolve a dispute over such charges*."[38]

Section 224 consequently does not extend to a broader regulatory authority, even with respect to attachments that are under the Commission's jurisdiction. As the legislative history shows:

> [The bill] does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 15476, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally.[39]

In contrast to the narrow focus of the statute on disputes, the proposed rule (proposed C.F.R. section 1.1420) assigns the pole owner several new responsibilities in the make-ready process that exceed the scope of rates, terms, and conditions subject to Commission review. Section 1.1420(d) requires the utility, upon receipt of payment, to "notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity."[40] Then, under

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[38] 47 U.S.C. § 224(e)(1) (emphasis added).

[39] S. Rep. 95-580 at 123.

[40] Section 224 addresses notice only in the context of a pole owner's own intention to modify or alter a pole. *See* 47 U.S.C. § 224(h) (stating "Whenever the owner of a pole … intends to modify or alter such pole …, the owner shall provide written notification of such action to any entity that has obtained an attachment … so that such entity may have a reasonable opportunity to add to or modify its existing attachment.").

proposed section 1.1420(d)(1) the utility "shall set a date for completion of make-ready no later than 45 days after the notice." Next, proposed section 1.1420(d)(2) provides that the utility "shall *direct and coordinate the sequence and timing of rearrangement of facilities* to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities."[41] Finally, under 1.1420(e), "[i]f make-ready work is not completed by any other attaching entities as required by paragraph (d) above, the utility or its agent *shall complete all necessary make-ready work*."[42] None of these new duties are, or directly pertain to, rates, terms, or conditions of a disputed, Commission-jurisdictional pole attachment agreement.

Section 224 nowhere mentions any obligation on the part of the utility to "direct and coordinate the sequence and timing of rearrangement of facilities" nor, still less, to "complete" make-ready work by "other attaching entities."[43] The statute provides no general grant of authority to regulate all attachments on utility poles in any manner the Commission sees fit. Because the Commission's regulatory authority does not extend to third-party attachments or other attachments not in dispute, the Commission has no authority to compel a pole owner to move such third-party, undisputed attachments.

b. The proposed rules would exceed the Commission's authority under section 224 by compelling pole owners to rearrange attachments that are not jurisdictional "pole attachments."

The Commission's authority under section 224 is further limited by the definition of "pole attachment." The Commission has no authority over "attachments" or attaching parties generally. On the contrary, the Commission is authorized only to regulate "pole attachments."

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[41] Order and FNPRM at Appendix B, proposed rule 1.1420(d)(2) (emphasis added).

[42] *Id.* at 1.1420(e) (emphasis added).

[43] In particular, neither section 224(b) nor section 224(f)(1) addresses third party attachments. *See* 47 U.S.C. §§ 224(b) and 224(f)(1).

The term "pole attachment" means attachments by certain classes of entities, namely cable systems and providers of telecommunications services.[44] The Commission has no authority to regulate attachments by any other kind of attaching party, including attachments by ILECs, municipalities, wireless ISPs, railroads, or any other entity that does not fall within the definition of "pole attachment." Under section 224, the Commission lacks authority over such non-jurisdictional entities not only with respect to rates, terms, and conditions but also, *a fortiori*, with respect to rearrangement of facilities. The FNPRM errs in assuming that the Commission possesses authority to rearrange the facilities of non-jurisdictional attaching entities.[45]

The fact that the Commission's pole attachment regulations count certain non-jurisdictional "attaching entities" for purposes of calculating the telecom rate is immaterial. The FNPRM asserts, for example, that the Commission has held that ILECs are "attaching entities" within the meaning of section 224(e)(2) and that, therefore, the Commission has authority to

[44] 47 U.S.C. § 224(a)(4) (defining "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility").

[45] The FNPRM states: "Although some commenters contend that we lack authority over incumbent LEC pole attachments under section 224, their arguments appear to focus on the Commission's ability to regulate the rates, terms, and conditions under which other utilities provide incumbent LECs access to their poles, rather than suggesting that the Commission lacks authority to regulate the rearrangement of pole attachments of incumbent LECs." *See* FNPRM at note 138 (*citing* "Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary," FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51, at 2 (filed May 5, 2010) ("AEP May 5, 2010 Ex Parte Letter"), "Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary," FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51 (filed May 12, 2010); ., Comments of the Edison Electric Institute and the Utilities Telecom Council at 99-104 (filed March 7, 2008) ("EEI NPRM Comments"). The Alliance does, in fact, respectfully submit that the Commission lacks authority to regulate the rearrangement of ILEC attachments on electric poles and any other non-jurisdictional attachments.

compel electric utilities to rearrange ILEC attachments.[46] The conclusion simply does not follow. Section 224 uses the term "attaching entities" once—in the context of a postulated allocation of the common-space costs: "costs … that *would* be allocated to such entity under an equal apportionment of such costs among all attaching entities." Thus, the term "attaching entities" is used purely as a reference point in a mathematical calculation of the rate applicable to the disputed pole attachment. There is absolutely no suggestion in section 224(e)(2) that these "attaching entities," whomever they may be,[47] are themselves necessarily subject to the Commission's regulatory authority in any manner.

c. The proposed timeline and facilities rearrangement mandate would violate section 224(f)(2) by requiring electric utilities to increase capacity.

The FNPRM's proposed timeline and mandate are contrary to statute because they would render meaningless the right of electric utilities under section 224(f)(2) to deny access for reasons of insufficient capacity.[48] The proposed facility transfer mandate would specifically violate 224(f)(2) by, in effect, requiring electric utilities to increase available capacity at the request of third parties. Under proposed rule 1.1420, the utility "shall" tender an offer within 14 days of receiving a completed application, "shall" notify attaching entities where rearrangement or pole replacement is needed, and, "[i]f make-ready work is not completed by any other

[46] Order and FNPRM at note 138 (stating that the Commission's "pole attachment regulations have encompassed incumbent LEC attachments in other contexts, and we believe that we have legal authority to adopt the requirements proposed above." (internal citations omitted)).

[47] Whether the term refers to a different set of entities than the term "pole attachments" is immaterial to the question of whether the Commission has authority under section 224 to compel electric utilities to transfer ILEC attachments.

[48] Section 224(f)(2) reads as follows: "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *See* 47 U.S.C. § 224(f)(2).

attaching entities" the utility "shall complete all necessary make-ready work."[49] Significantly, footnote 37 of the accompanying Order defines "make-ready" as "any rearrangement of equipment and attachments in order to make room on either an existing pole or a new, different pole for a new attacher."[50] If that is, in fact, the Commission's definition of "make-ready," it would appear that the rule applies to both rearrangements and pole replacements. Both rearrangement and pole replacement, in turn, are means of expanding capacity. The rule, therefore, seems to presume that the utility has an obligation to expand capacity, and nowhere acknowledges the possibility that the utility could deny access for reasons of insufficient capacity. The rule, instead, simply requires the utility to make new capacity by moving the existing attachers' facilities for them or, in the case of pole replacement, by moving the existing facilities onto a new pole in proper sequence.

As the court made clear in *Southern Company v. FCC*, section 224(f)(2) "carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers."[51] Accordingly, the court held, "[w]hen it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'"[52] The court's ruling overturned the Commission's conclusion in the Local Competition Order that sections 224(f)(1) should be interpreted to require electric utilities to

[49] Order and FNPRM at Appendix B, proposed rule 1.1420(c), (d), and (e).

[50] *Id.* at fn. 37.

[51] 293 F.3d 1338, 1347 (11th Cir. 2002).

[52] *Id.* (stating "As Commissioner Michael Powell noted, "it is hard to see how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties.").

"take all reasonable steps to expand capacity."[53] The Local Competition Order nevertheless makes clear that a "lack of capacity" includes any situation where existing attachments must be rearranged in order to "make room" for the new applicant. In fact, in most cases, increasing capacity is a matter of rearranging existing facilities: "In some cases, a request for access can be accommodated by rearranging existing facilities to *make room* for a new attachment."[54] In other cases, however, "*increasing capacity* involves more than rearranging existing attachments …."[55]

The FNPRM's proposal to require electric utilities to move existing third-party facilities is, therefore, essentially a requirement to increase capacity regardless of whether it is applied to rearrangements or pole replacements. Any requirement to increase capacity falls within the holding of *Southern Company v. FCC*[56] and would, therefore, violate the right of the utility to deny access for reasons of capacity under section 224(f)(2). The proposed facilities rearrangement mandate is inextricably tied to the same failed reasoning the Commission used to justify its attempted capacity increase mandate in the Local Competition Order and would not, accordingly, withstand judicial scrutiny.

d. The proposed rules would render meaningless the electric utility's right to deny access for reasons of safety, reliability, and engineering.

Under section 224(f)(2), an electric utility may deny access "on a non-discriminatory basis … for reasons of safety, reliability and generally applicable engineering purposes." There is no right to access when the utility denies access for reasons of safety, reliability, or generally

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[53] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Report and Order at para. 1161, FCC 96-325 (1996) ("Local Competition Order").

[54] *Id.* at para. 1161 (emphasis added).

[55] *Id.* at para. 1163 (emphasis added).

[56] *Southern Co. Servs, Inc. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

applicable engineering purposes. As the court explains in *Southern Company v. FCC*, "[t]he entire purpose of [section 224(f)(2)] is to specify the conditions under which the general rules mandating access for third parties do not apply. By attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they do not apply, the FCC is subverting the plain meaning of the Act."[57] To determine whether a proposed attachment poses safety, reliability, or engineering concerns, a utility must have adequate time to evaluate the proposal and study its existing facilities. An inflexible deadline arbitrarily short-circuits this facility evaluation process and thus renders the electric utility's right under 224(f)(2) meaningless.[58]

The proposed timeline mandate could jeopardize the safety, reliability, and sound engineering of both electric and communications systems. Electric utilities typically lack the expertise needed to transfer third-party fiber. Requiring the utility to physically make such transfers where the attaching party refuses to cooperate could create unsafe conditions for workers and the public, jeopardize the reliability of both electric and communications services, and violate generally applicable engineering standards. The incumbent attaching entities have the legal responsibility and technical expertise to transfer their own facilities. Electric utilities cannot and should not be compelled to assume the risks and liabilities associated with moving such facilities.

There is no fixed, uniform make-ready timeframe that can adequately accommodate the utility's right and responsibility to evaluate the safety, reliability, and engineering impacts of a proposed attachment.

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[57] *Id.* at 1347.

[58] The existence of such a deadline, if too soon in a given case, itself would constitute a safety reason for denying access. If there is insufficient time to evaluate potential safety impacts, how can the utility responsibly allow access?

e. The proposed rules exceed the FCC's jurisdiction to the extent they conflict with state regulations.

The Commission has repeatedly recognized that state laws and regulations apply to access to electric utility poles, including in states that do not otherwise regulate pole attachment rates, terms, and conditions.[59] Requiring the pole owner to transfer existing attachments potentially conflicts with numerous such laws and regulations. State laws affecting access include clearance requirements, right-of-way-regulations, and worker safety requirements. It should also be noted that, in some cases, state commissions in states that have not "certified" under section 224(c) have nevertheless approved ILEC-electric joint use agreements with provisions that conflict with the timeline mandates of the FNPRM. In many cases, the joint use agreement simply does not allow the electric utility to move ILEC attachments in the proposed manner. Contract modifications would first have to be negotiated and, in some cases, approved by state regulators.

f. The Commission has no authority to require the pole owner to notify existing attaching entities that they must move or rearrange their attachments to accommodate a new applicant.

The FNPRM proposes that "when it receives payment, a utility must notify immediately all entities whose existing attachments may be affected by the project" and that such notification must include "a reminder that those attachers have 45 days to move, rearrange, or remove any facilities as needed to perform the make-ready work and that, if they fail to do so, the utility or its agents, or the new attacher, using authorized contractors may move or remove any facilities that impede performance of make-ready, consistent with the fifth stage of the timeline …."[60]

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[59] Local Competition Order at para. 1154 ("[W]e conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).").

[60] Order and FNPRM at para. 40.

This notice requirement thus has three parts: (1) notice that the make-ready work is commencing; (2) notice that the existing attacher has 45 days to dispose of its facilities as needed to make room for the new attacher; and (3) notice or, in effect, warning that the utility itself may move such facilities. The Commission has no authority to require notice to existing attachers of any of these events.

(i) Notice to third-parties is not a rate, a term, or a condition.

Section 224(b) authorizes the Commission to hear and resolve complaints regarding rates, terms, and conditions. A requirement that the utility pole owner provide notice to third parties is not a rate. Nor is it a term or condition of the *applicant*'s access. Accordingly, the Commission has no authority under section 224(b) to require the utility to notify third parties.

(ii) Section 224(h) provides no authority for the proposed notice requirement.

The only language in section 224 that relates to notice does not directly apply in the case of a new applicant seeking access. Section 224(h) provides that, whenever the "*owner* of a pole, duct, conduit, or right-of-way *intends to modify or alter* such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action *to any entity that has obtained an attachment to such conduit or right-of-way* so that such entity may have a reasonable opportunity to add to or modify its existing attachment."[61] Accordingly, only when the owner intends to modify or alter its own pole, duct, conduit, or right-of-way does the owner have an obligation to provide notice. Thus, with regard to the first part of the notice requirement, the utility is obliged to provide notice to an existing attaching entity only when the utility itself intends to modify or alter the pole, duct, conduit or right-of-way and only with respect to certain types of attachments.

[61] 47 U.S.C. § 224(h) (emphasis added).

Where the utility itself has no need, and therefore no intention, to modify or alter the "pole," it has no obligation to provide notice of make-ready to the existing attachers. For example, if the make-ready work needed to make room for a new attacher involves only rearrangement of existing communications facilities, but not pole replacement or other new construction by the utility, the utility would not be obliged to provide notice.

4. The proposed one-size-fits-all timeline and facilities rearrangement mandate would be an arbitrary and capricious departure from the Commission's well-established case-by-case approach to make-ready disputes.

The Commission's proposed rule is an arbitrary and capricious departure from prior policy because: (a) the Commission fails to acknowledge the magnitude and radical nature of the proposed new approach to pole attachment regulation; (b) the proposed policy choice is not rationally connected to the facts found; and (c) its proposed policy contradicts the factual basis of the Commission's existing policy without providing an adequate new factual basis.

a. The Commission fails to acknowledge the magnitude and radical nature of its proposed policy change.

The Commission has repeatedly confirmed that its pole attachment regulations apply only where there is a dispute: "These rules apply when parties are unable to arrive at a negotiated agreement and an aggrieved party files a complaint."[62] Although the FNPRM acknowledges its intention to move from "case-specific adjudication" of access disputes to "broadly applicable rules," it fails to acknowledge the substantial "mission creep" entailed in its proposed timeline. By adopting the proposed timeline and facilities rearrangement mandate, the Commission would

[62] *See Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration at para. 10, FCC 01-170 (2001) ("2001 Reconsideration Order").

foist upon the pole owner a fundamentally new role: traffic cop and one-stop-shop for the make-ready process. The FNPRM nowhere acknowledges or explains this radical shift.

The Alliances agrees with the FNPRM that "timely action by all the relevant participants in the pole attachment process is important to ensure just and reasonable access to poles."[63] Its proposed solution is to establish a "comprehensive timeline." The Commission, however, nowhere acknowledges that the timeline, as proposed, appears to be binding on only one "participant"—the pole owner—and subjects the pole owner to multiple, new, up-front obligations with respect to non-applicant parties. These duties include notifying third parties, directing and coordinating rearrangement of third-party facilities, and even moving the third parties' own facilities for them when they fail to do so. Apart from the timeline mandate, as explained further below, the utility must also act as "clearinghouse" for collection and disbursement of facility transfer related expenses among various parties and perform sundry other duties on behalf of the applicant.

The sum of these requirements is to transform the limited section 224(f) access right (enforceable by complaint arising from privately negotiated terms and conditions) into a right of the applicant to commandeer the utility's resources and facilities to complete the make-ready process on the applicant's Commission-dictated terms and conditions. The FNPRM nowhere acknowledges this shift, speaking only of a "comprehensive timeline" purportedly applicable to "all the relevant participants" but actually binding on only one: the pole owner.

[63] Order and FNPRM at para. 25.

b. The facts found do not justify the policy choice proposed.

The "evidence" on which the FNPRM's timeline proposal is based is comprised of three inconclusive assertions in three sentences.[64] Apart from citations that show examples of utilities "providing *swift access* to poles," the proposal rests chiefly on anecdotal reports of "significant delays" and a UTC study showing that make-ready *performance* takes more than 90 days in 31 percent of cases (which is less than the time period allowed under the proposed timeline).[65] There is almost no analysis of this "evidence," no attempt to determine what factors led to the "delays" in the cases cited, no discussion of the role of existing third-party communications attachers (despite the FNPRM's finding that existing attachers are the only parties likely to have an incentive to "frustrate and delay" access by their competitors), no discussion of why a timeline—rather than a case-specific approach—is needed, and absolutely no consideration or presentation of the views of the electric industry (except to quote the UTC study out of context to support the timeline proposal). The mere fact that timing of make-ready can affect a communications company's "decision whether to serve a particular market at all" is simply a matter that a communication company, using its business judgment, would presumably want to factor into its business plan—not evidence against a public utility whose first priority is customer service in compliance with customer service obligations pursuant to state laws and existing contracts.

[64] *See Id.* at para. 26 (asserting that (1) make-ready timing "can vary widely" with delays impacting communications providers ability to serve customers and their decisions of whether to serve a particular market; (2) "there is evidence of many other examples of significant delays; and (3) while most requests are approved or denied with 45 days, the "*performance*" (not approval) takes more than 90 days in 31 percent of cases. (Emphasis added)).

[65] *Id.* at para. 26 (emphasis added).

(i) The proposed rule unnecessarily and unjustly penalizes pole owners instead of holding unresponsive existing attachers accountable for delay tactics used to gain an unfair competitive advantage.

The Alliance agrees with the Commission that "timely action *by all the relevant participants* in the pole attachment process is important to ensure just and reasonable access to poles."[66] Despite the need for action by multiple "participants," the proposed rules would make only one "participant"—the pole owner—exclusively responsible for ensuring that make-ready work is completed within the specified deadlines.[67] The FNPRM preamble asserts that the obligation to complete make-ready work under the timeline extends "not only to the utility, but also to the existing attachers."[68] However, the text of the proposed rule uses mandatory language only with respect to utilities—no obligations on existing attaching entities are clearly specified. In fact, under the proposed rule, the only consequence for an existing attacher that fails to move its facilities in a timely manner to make room for a new competitor is that the pole owner is then compelled to move the existing attacher's facilities instead.

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[66] *Id.*at para. 25 (emphasis added).

[67] Under 47 C.F.R. § 1.1420(b), the utility is required to complete its survey and engineering analysis within 45 days. If the utility "fails" to complete these studies and deliver the result to the applicant, the applicant "may" use its own contractor to complete the survey and analysis. Next, within 14 days of delivering the survey, the utility "shall" tender an offer to perform all necessary make-ready work. At this point, the applicant need only accept the offer and make an initial payment within 14 days. Upon receipt of payment, the utility "shall" notify "immediately" all attaching entities that may be affected by the project and "shall" specify the date after which the utility is authorized to move the facilities of the attaching entity. The utility is further required to set a date for completion of make-ready not later than 45 days after the notice and "shall direct and coordinate" the sequence and timing of rearrangement. If make-ready work is not completed by other attaching entities on time, the utility "shall complete" all necessary make-ready work, including rearranging or replacing the facilities of existing ILEC and cable attachers. If make ready work is not completed on time, the applicant then "may" use its own contractor to do so.

[68] Order and FNPRM at para. 41.

The FNPRM cites anecdotal evidence of "significant delays."[69] The FNPRM, however, does not explain which of the "relevant participants" are responsible for these delays or otherwise explain what circumstances in each case may have reasonably led to such alleged "delays." The FNPRM fails to show that electric utility pole owners are causing delays or explain how the proposed rule would achieve the Commission's policy goal of ensuring timely access by new entrants.

(a) Electric utility pole owners already provide timely access whenever possible.

In the Alliance's experience, electric utility pole owners already provide timely access whenever possible. As the FNPRM acknowledges, "in most cases, utilities meet their obligation to approve or deny a request for pole access within 45 days."[70] For example, AEP reports that for the year 2010 to date the seven of its operating company subsidiaries that have received the most attachment applications have completed surveys in an average of under 33 days and have completed the make-ready process in an average of approximately 48 days. (See Fig. 1, below).

Fig. 1–AEP Average Make-Ready Times, 2010 YTD (CATV/CLECs only)
Note: Operating Companies not included have very little proposal activity in 2010.

Operating Company	No. Proposals	Total No. Poles	Avg Days to Survey	Avg Total Days
AEP TX Central	71	480	34	57
AEP TX North	17	95	45	50
Appalachian Power	124	773	60	69
Columbus Southern Power (Non-FCC)	34	131	28	50
Indiana Michigan (MI Non-FCC)	24	326	23	26
Ohio Power (Non-FCC)	67	566	25	43
SWEPCO (TX; AR, LA Non-FCC)	42	169	14	39
OVERALL			33	48

[69] *Id.* at para. 26.

[70] *Id.*at para. 26.

(b) Non-electric utility "participants" in the make-ready process that compete in broadband markets have an incentive to obstruct access by new competitors.

As the FNPRM and the National Broadband Plan acknowledge, delays can result from "existing attachers' action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor …."[71] Also, the FNPRM recognizes that electric utilities typically have no interest in delaying access. By contrast, existing communications attachers may have a strong disincentive to cooperate with their potential competitors and thus a strong incentive to prevent their competitors from gaining access:

> In the majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart; incumbent LECs may make no such claim. In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment.[72]

For example, FP&L reports that it has completed its extensive make-ready work associated with an attachment request in Volusia County, Florida involving more than 200 line miles by a competitive local exchange carrier applicant. At the time of FP&L's completion of its make-ready work for the applicant, the applicant reported that it was still waiting for the existing ILEC attacher to *commence* its make-ready work. This delay in the ILEC's make-ready work has imposed a delay of FP&L's post-inspection of the overall project.

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[71] *Id.* at para. 129, *citing* Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 129 (2010), *available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("National Broadband Plan").

[72] *Id.* at para. 68.

It occurs to the Alliance that, if delays are the result of "existing attachers' action (or inaction)," then the Commission may wish to take corrective action against those existing attachers, not against the electric utility pole owner.

(ii) The proposed rules undermine the Commission's broadband policy goals by giving an unjust competitive advantage to incumbent communications attachers at the expense of new entrants.

The proposed timeline rule imposes numerous obligations on the utility, but directly requires no action whatsoever by the incumbent attaching entities. Accordingly, under the proposed rule, ILECs and cable companies whose attachments are already on the pole would have no incentive to accommodate attachment requests by new entrants and would face no regulatory sanction for failing to respond to a directive from the utility to move its facilities. On the contrary, the proposed rule would only exacerbate this problem because such existing attachers—who are the applicant's direct competitors in many cases—would have a strong incentive to do nothing and let the utility and the applicant do all the work and bear all of the expense for rearrangement.

c. The facts previously found have not changed to justify the proposed radical departure from the Commission's long-standing, case-specific approach to access requirements.

As the Commission has repeatedly recognized, access terms and conditions are inherently case-specific determinations which cannot reasonably be overridden by one-size-fits-all rules. For example, in the Local Competition Order, the Commission concludes that

> the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis. . . . The record makes clear that there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.[73]

[73] Local Competition Order at para. 1143; *see also* 2001 Reconsideration Order at para. 45.

In stark contrast, the FNPRM would adopt precisely the opposite approach for make-ready: a generic rule dictating a one-size-fits-all timeline for all attachment applications. Although the FNPRM also seeks comment on possible adjustments or exclusions from the timeline, even a more complex rule-based approach is unlikely to adequately account for so many "variables" on the "millions of poles and untold miles of conduit" across the nation.

The FNPRM provides no justification for such a radical departure from the Commission's long-standing, common-sense policy of evaluating access terms and conditions on a case-specific basis. This policy has been in place since the Commission first implemented the 1978 Pole Attachments Act. In the 1996 Telecommunications Act's amendments to section 224, Congress gave no reason for the Commission to depart from such policy. Accordingly, the Commission forcefully reiterated the same case-specific policy in its orders implementing those amendments. Today, just as in 1996, no two pole access applications are identical. Some requests necessarily take longer to accommodate than others.

(i) The make-ready process has become even more complex due to the growing number and variety of attachments.

Along with the variables identified in the Local Competition Order, numerous new variables now further complicate the make-ready process, including a bewildering variety of new attachments of differing size, weight, material, and attachment configuration. The presence of these attachments further complicates make-ready. For each of these attachments, if rearrangement or pole replacement is needed to accommodate a new attachment, the owner (if known) of the existing attachment must be notified, the attachment must be taken into account in the engineering analysis, and the attachment must be safely transferred in compliance with applicable restrictions.

In addition to wires, examples of third-party attachments on utility distribution poles that may complicate make-ready include, but are not limited to, the following: wireless equipment,[74] power supplies,[75] government attachments,[76] and a startling variety of unauthorized attachments.[77]

(ii) A wide range of local variations continue to complicate make-ready.

In addition to a profusion of new types of attachments, there continue to be a wide range of local variations in circumstances which can affect make-ready completion times. In the Local Competition Order, the Commission "adopted a flexible regulatory approach to pole attachment

[74] Today, a far greater number of DAS, Wi-Fi, and other wireless-related antennas, nodes, and associated cables are attached electric poles than in 1996. Many of these devices produce dangerous levels of RF, which further complicates make-ready for electric linemen and third-party contractors. Additional clearances required for antennas may make pole-replacement necessary to accommodate new attachers. See http://www.extenetsystems.com/aboutus/photogallery.html for examples of DAS antennas, nodes, fiber and related hardware attached to utility poles.

[75] Advanced telecommunications services offered by ILECs, cable systems, and other communications providers increasingly require battery-backup units or other power-supply-related equipment. A significant number of these units (some weighing 900 pounds or more) are attached to electric utility distribution poles. Pole-mounted solar panels are increasingly used for various distributed power applications. Transferring these units requires additional time and specialized labor.

[76] Government attachments include street lights, security cameras, traffic lights and traffic management sensors, traffic and other signs, holiday lighting, and Homeland Security-related devices. Special restrictions and permitting requirements often apply to any transfer of such equipment.

[77] Unauthorized attachments can unexpectedly complicate make-ready. Such attachments (by cable systems, CLECs, WISPs, and individuals) include communications wires, stand-off brackets, extender arms, antennas, signage, and even laundry lines, basketball hoops, satellite television dishes, customer-owned lighting, fences, and deer stands. J-hooks for unauthorized service drops cause NESC violations which must be corrected during any subsequent make-ready work.

disputes that ensures consideration of local conditions and circumstances."[78] As the Commission explained:

> The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices. In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will use.[79]

In light of these variables, the Commission draws an unmistakable conclusion:

> It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements.[80]

Today, at least as much as in 1996 (if not more so), it remains impossible to "identify and account for" all local variations affecting make-ready work. Examples of *categories* of such local variations include weather,[81] bucket-truck accessibility,[82] state and local laws and regulations,[83] and railroad right-of-way restrictions.[84]

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[78] Local Competition Order at para. 1144.

[79] *Id.* at para. 1149.

[80] *Id.*

[81] Storm severity, wind and ice loading, temperature extremes, and other weather-related factors vary widely across the country. Vulnerability to hurricanes in coastal areas has resulted in changes in specifications for storm-hardened pole infrastructure, adding to time and expense to make ready.

[82] Under ideal conditions, it is safer, faster, and cheaper to access poles using a bucket truck rather than climbing. However, in many areas, including densely settled urban or suburban areas and areas with uneven terrain, many poles must be climbed, requiring additional time and expense for make-ready work. AEP reports that, in typical suburban communities served by its operating companies, roughly two-thirds of the poles may inaccessible by bucket truck. For example, Reynoldsburg, Ohio (suburb of Columbus) is a fairly typical, flat suburban community with a population of 33,000 people and 7,521 poles located within 10 square miles.[82] AEP's

(iii) Utility-specific standards continue to reasonably reflect local variations.

As the Commission has acknowledged, these local variations are reasonably reflected in utility-specific standards that "dictate conditions of access" and should not be overridden by generic rules:

> Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions.[85]

Examples of local and utility-specific variations that affect make-ready timing include restrictions on the use of boxing and extension arms for communications equipment. As the

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analysis, using line maps showing pole locations (backyard poles and rough distance from right of way) and assuming that truck booms can safely extend no further than 15 feet from the paved portion of the right of way, showed that only 2,346 of the poles (approx 31%) are within 15 feet of the right of way and therefore truck accessible. Thus, 69% of AEP's Reynoldsburg poles must be climbed.

[83] State transportation departments sometimes have varying clearance requirements. Some local communities have specific permitting requirements and work hour restrictions when facilities are located within the public right-of-way.

[84] Electric utilities typically cannot move an existing party's equipment that is located within a railroad corridor without a railroad permit. Railroads only provide such permits to the infrastructure owner and require the infrastructure owner to provide indemnification and insurance. The utility simply cannot move an existing party until they get their railroad permit. The timeline on such permits is very long. AEP reports that CSX railroad typically takes six to nine months to grant a permit. For Norfolk Southern, 60 to 90 days is typical.

[85] *Id.* at para. 1148. As Duquesne notes, the provision of electricity is the result of varied engineering factors that continue to evolve. Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards. In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers. As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.

Commission's recent declaratory ruling on nondiscriminatory access makes clear, utilities are not required to allow attaching entities to use construction practices that the utility determines are not consistent with that utility's "existing practices."[86] According to the Commission, the purpose of such construction practices is to speed make-ready: "boxing and bracketing can help avoid the cost and *delay of pole replacement or make-ready work* involving electrical facilities …."[87] Because the Commission has stated that the utility has discretion to allow or forbid specific practices that could affect make-ready times with respect to specific poles, it makes no sense for the Commission now to prescribe "uniform standards and requirements," such as a uniform timeline requirement, for make-ready.

(iv) Applicable industry codes reflect the need to accommodate local variations.

The Commission has also recognized that generic access rules would contradict the pragmatic approach reflected in the National Electrical Safety Code (NESC):

> Our determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment. The NESC, one of the national codes that virtually all commenters regard as containing reasonable attachment requirements, contains thousands of rules and dozens of tables and figures, all designed to ensure 'the practical safeguarding of persons during the installation, operation, or maintenance of

[86] Access is "limited by the utility's existing practices. If a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all." *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, Declaratory Ruling at para. 11, FCC No. 10-84 (2010). ("Declaratory Ruling").

[87] Declaratory Ruling at para. 8 (emphasis added). Even where a utility allows a specific construction practice, it is free to forbid that practice on a "single pole or class of poles for reasons of safety, reliability and generally applicable engineering purposes." *Id.*

> electric supply and communication lines and associated equipment.'[88]

Accordingly, the Commission concludes, "[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we."[89]

The FNPRM provides no new facts to suggest that the variability of industry implementation of the NESC is any less than it was in 1996. On the contrary, the industry's implementation of the NESC—and, as a consequence, the NESC itself—continues to evolve. Although the FNPRM itself asserts that it reaffirms that "no single set of rules" can account for the uniqueness of each installation,[90] it nevertheless prescribes a single set of make-ready timing rules that, in its rigidity, does not take into account the unique, fact-intensive nature of each make-ready project.

Given the Commission's repeated and unambiguous rejection of a rule-based approach to access issues, and given the continuing validity of the policy reasons for a case-by-case approach, the proposed one-size-fits-all make-ready rules would be an arbitrary and capricious departure from precedent.

B. Schedule of Common Make-Ready Charges

The FNPRM proposes to mandate that utilities make available to attaching entities a "schedule of charges" for the most common categories of work, such as engineering assessments

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[88] Local Competition Order at para. 1145.

[89] *Id.* at para. 1151 ("[I]n evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. We have no reason to question the reasonableness of the virtually unanimous judgment of the commenters, many of whom have otherwise diverse and conflicting interests, in this regard.").

[90] On the contrary, the FNPRM states that it "reaffirms" that "no single set of rules can take into account all the issues that can arise in the context of a single installation or attachment."

and pole replacement.[91] The Alliance believes any Commission policy with regard to estimates of make-ready charges should reflect the case-specific nature of make ready and the variability of the various labor and material elements for which the utility incurs expenses in the course of performing make-ready. Accordingly, the Alliance urges the Commission to continue to allow the private parties to negotiate make-ready charges in light of the totality of circumstances and cost variables in each case. In contrast, the Alliance objects to the proposed rule because it exceeds the Commission's authority under section 224 and would be an arbitrary and capricious departure from the Commission's well-established case-by-case approach to pole attachment regulation. The Alliance is also concerned that the rule, as drafted, is unclear with regard to what constitutes "attaching entities" and a "schedule of charges."

1. A better alternative is to allow the private parties to negotiate the charges for make-ready on a case-by-case basis.

The charges for make-ready construction for the same adjustments on a pole can vary dramatically. For instance, the number of attachments on the pole, the location of the pole (in the road right-of-way versus in a rear easement or difficult terrain), local restrictions requiring the performance of construction only at night or on weekends, complications due to an adjacent pole being incompatible with the work, and other case-specific factors can affect an estimate of make-ready charges. These factors prevent the creation of a "menu" of make ready charges.

2. The Commission has no statutory authority to mandate a schedule of common make-ready charges.

As explained in the Alliance's comments on the make-ready timeline above, the Commission's regulatory authority over pole attachment disputes is limited to adjudicating complaints over rates, terms, and conditions in specific instances after private negotiations

[91] Order and FNPRM at Appendix B, proposed rule 1.1426(a).

between the parties have failed. The statute does not provide for prospective rate filings or public disclosure of rates otherwise. If Congress had intended to require advance disclosure of pole attachment rates or make-ready charges, it would have expressly provided for such disclosure in the statute, as it has done in numerous other contexts within the Communications Act.[92] By requiring utilities to provide a schedule of charges to potential applicants before an attachment agreement is in place the Commission would, in effect, institute a rate publication requirement for which it has no statutory warrant.

The text, structure, and legislative history of section 224 show that requiring a pole owner to take specific action presupposes a complaint regarding the rates, terms, or conditions of an existing pole attachment agreement.[93] The Commission's authority to "take such actions as it deems appropriate and necessary" is provided solely for purposes of "enforcing any determinations resulting from complaint procedures" established under section 224(b). Section 224(e) directs the Commission to establish regulations to govern pole attachment charges "when the parties fail to resolve a dispute over such charges." Nothing in section 224 contemplates an open-ended authority to fix, or require the disclosure of, make-ready or other pole attachment charges in advance of a negotiated agreement. Moreover, the legislative history shows that Congress had no intention for the Commission to embark upon or otherwise require "'a large-scale ratemaking proceeding in each case brought before it, *or by general order*' to establish pole rental rates."[94] The courts have confirmed that the Commission's pole attachment authority

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[92] *See, e.g.,* 47 U.S.C. § 203(a) (requiring common carriers to "file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers").

[93] 47 U.S.C. § 224(b)(1). Section 224(b)(1) provides for procedures "to hear and resolve complaints concerning such rates, terms, and conditions.

[94] Order and FNPRM at para. 135, *citing* Sen. Rep. No. 95-580, 1798 U.S.C.C.A.N. 109, at 23 (emphasis added).

under section 224 is limited to reviewing negotiated settlements. For example, in *Southern Company v. FCC*, the D.C. Circuit stated: "[t]he agency's limited authority to review negotiated settlements is consistent with the statute."[95]

The proposed rule 1.1426 references a "schedule of … charges." Section 224, however, makes no reference to any "schedule of charges." Elsewhere in the Communications Act, the term "schedule of charges" is used in several provisions expressly requiring "common carriers" to publicize charges for various communications services. Section 203, for example, requires common carriers to "print and keep open for public inspection schedules showing all charges …."[96] The FNPRM proposed schedule of charges mandate appears to be the same kind of mandate, as under section 203 (with the exception that the FNPRM does not expressly require filing such schedules with the Commission). However, section 203 does not apply to pole attachments on electric utility poles. If Congress had intended to require electric utilities to publish schedules of common make-ready charges pursuant to section 224, it would have included such a requirement in that section.

3. The proposed make-ready charges schedule would be an arbitrary and capricious departure from the Commission's well-established case-by-case approach.

The FNPRM provides no substantial evidence to suggest that requiring utilities to post such a schedule would achieve the Commission's goals.[97] As explained below, make-ready

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[95] *Southern Co. Servs, Inc. v. FCC*, 313 at 582-84.

[96] 47 U.S.C. § 412 (requires the schedules of charges be "preserved as public records").

[97] Rather than giving any evidence, the FNPRM simply cites the National Broadband Plan for the assertion that the schedule mandate would be an "an additional way to lower the cost and increase the speed of the pole attachment process." Order and FNPRM at para. 71. The FNPRM also asserts that such a schedule could provide "transparency" to prospective attachers and thereby "fortify" the "just and reasonable access standard" for pole attachments.*Id.* at para. 71. The FNPRM seems to presume that these assertions are self-evident. However, it is not at

charges are necessarily calculated on a case-by-case basis. Also, "transparency" for the sake of transparency does nothing to lower make-ready costs. Make-ready costs are determined by the markets for poles and associated construction materials and labor costs for contractor work where needed. Electric utility pole owners can neither predict with precision nor control these cost variables. Posting projected, generic estimates of costs would likely only produce new disputes over make-ready charges, thereby potentially delaying, not speeding, access.

a. There is no such thing as a "common make-ready charge" other than an overall average which should not be considered binding in specific cases.

The proposed rule does not define "common make-ready charges." The NBP recommended that the Commission establish a schedule of charges for the "most common categories of work (such as engineering assessments and pole construction)." It is unclear what a "common" charge would be for an engineering assessment or pole construction, both of which activities are inherently fact-intensive. This work, which depends upon fluctuating prices and availability of contract labor and materials, is not typically priced on a per-unit basis. In addition to the size of the request, the timing of the request (relative to existing requests in the queue), geographic variables, existing capacity, the type of attachments requested, and other factors make it very difficult, if not impossible to assign "common" values to make-ready work. For such activities, a "common" charge would necessarily be nothing more than an overall average which would have little or no applicability to subsequent, specific access requests.

Assuming, *arguendo*, that the Commission has authority to mandate a schedule of charges (and it does not), the Alliance urges the Commission to clarify that the specific posted "common charge" amounts are only "ball-park" guidelines that are not binding against the utility

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all clear that requiring a posted schedule of charges would make those charges lower or more just and reasonable, or speed access.

and cannot be entered in a complaint proceeding as evidence of an unjust, unreasonable, or discriminatory make-ready charge. It should also be noted that electric utilities have no practicable means to identify or control the price of moving communications fiber and other communications equipment, which requires specially trained labor to accomplish. Accordingly, the Commission should clarify that "make-ready charges" for purposes of this rule excludes the cost of transferring the facilities of existing communications attachers.

b. The proposed mandatory schedule of charges represents a fundamental departure from the Commission's well-established case-by-case approach to resolving disputes over make-ready charges.

By purporting to require utilities to post make-ready charges in advance, regardless of facts and circumstances, the FNPRM's approach would transform the Commission's established case-specific approach into a one-size-fits-all regulatory regime of the sort the Commission has specifically rejected on every occasion. Neither the FNPRM nor the record otherwise provides any evidence to suggest that make-ready pricing is no longer a fact-specific activity or that there is any other justification for requiring utilities to publish a schedule of make-ready charges. To mandate such a schedule would accordingly be an arbitrary and capricious abuse of discretion by the Commission.

C. Utility commandeered to serve as "clearinghouse" for administration of existing attachment transfers.

The FNPRM proposes that the pole owner (deemed the "managing utility") "administer the pole during the make-ready process," including managing certain associated "transfer[s] of funds."[98] Specifically, a proposed new rule 1.1428(b) would require the pole owner to collect from existing attachers statements of rearrangement costs, bill the new attacher for those costs,

[98] *Id.* at para. 73.

and disburse compensatory payment to the existing attachers.[99] In essence, the utility would be required to act as a collection agency (or "clearinghouse" as the FNPRM describes this role) with respect to transactions between the applicant and existing attachers. It is not clear what costs the utility would be permitted to charge the applicant for managing this collections process. The Commission also seeks comment on "any alternatives for managing this process."[100]

The Alliance urges the Commission to leave the details of the transfer process to the private parties and, to the extent necessary, to require the applicant and other attaching entities to handle the transfer cost administration between themselves. The Alliance opposes the clearinghouse mandate proposal because it is inconsistent with an electric utility's responsibilities to the public and its shareholders. The proposal also exceeds the Commission's authority, and would represent an unjust and unreasonable departure from the Commission's prior policy.

1. A better alternative is to make the applicant responsible for paying the existing attaching entities directly and requiring those attaching entities to cooperate with the applicant in a timely manner.

As an alternative to requiring the utility to "administer" the make-ready process, the Alliance urges that the Commission allow the private parties to negotiate the specific details of how the make-ready process is administered. Consistent with the Alliance's proposed alternative to a make-ready timeline above, the Commission should clarify that, by default, the applicant is responsible for contacting existing attachers, collecting cost statements from them, and paying the applicable charges to such entities directly. To the extent of the Commission's authority, it should also require existing third-party communications attachers to cooperate with the applicant.

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[99] *Id.*

[100] *Id.*

In some cases the utility may determine that it *wants* to operate as the clearinghouse. To accommodate this option, the Commission should clarify that it is just and reasonable for the utility, at its discretion, to include in its pole attachment agreement with the applicant a provision allowing the utility to charge the applicant for all costs attributable to managing the collection and disbursement of the transfer charges, plus a reasonable fee. Providing such "administrative" services to attaching entities would be consistent with the utility's responsibilities to the public and its shareholders only to the extent such attachments are made in compliance with applicable safety and engineering requirements and the utility is compensated for the attacher's fair share of the capital and operations costs, including a reasonable return on equity, associated with its pole infrastructure.

2. The proposed clearinghouse rule exceeds the Commission's statutory authority.

Section 224 does not assign the pole owner the role of "managing utility" or the "responsibility to administer the pole during the make-ready process."[101] "Administering" the pole here means taking responsibility for all aspects of the existing attachment transfer process, including taking on various tasks that would otherwise be the responsibility of the applicant or existing third-party attaching entities. The FNPRM provides no statutory basis for assigning such general administrative duties to the utility. Instead, the FNPRM simply assumes its own conclusion: that the managing utility has such a duty under section 224 to "administer" the pole during the make-ready process. Then, in support of its specific clearinghouse proposal, the FNPRM perfunctorily cites sections 224(b), 224(f), and 224(i).[102] None of these provisions authorizes the proposed rule.

[101] 47 U.S.C. § 224.

[102] Order and FNPRM at para. 73.

First, the FNPRM cites 224(b)(1) and (2) as providing authority to "adopt rules to ensure that terms and conditions of attachment are just and reasonable, which terms and conditions include the specific right of access in section 224(f)."[103] Section 224(b), however, provides no authority for the proposed clearinghouse rule. As explained in the Alliance's comments on the make-ready timeline above, the Commission's regulatory authority under 224(b)(1) and its rulemaking authority under 224(b)(2) are purely ancillary to its specific mandate to hear and resolve complaints in specific disputes between jurisdictional utilities and jurisdictional attaching entities over pole attachment rates, terms, and conditions. Section 224(f) likewise adds nothing to the basic complaint-based structure of the Commission's section 224 regulatory regime. Thus, neither section 224(b) nor 224(f) provides open-ended authority—or any authority—to require utilities to shoulder the responsibilities of all other parties in the make-ready process, whether by generic, prospective rule or by requiring a utility to accept such responsibility in a specific case.

The FNPRM also notes that "only the utility has privity with both the requesting entity and the existing attachers" and cites section 224(i).[104] The fact that the utility may have privity of contract with the existing attaching entities may appear to provide a convenient justification for assigning it the clearinghouse role; however, such privity is wholly irrelevant because the Commission's section 224 authority extends only to complaints regarding disputed attachments, not to the pole owner's contractual relations with other attaching entities whose attachments are either not in dispute or, in many cases, not subject to section 224 at all.[105]

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[103] *Id.*

[104] *Id.*

[105] The Commission's regulatory authority is limited to hearing and resolving complaints over the rates, terms, and conditions in disputed cases. Even the Commission's rulemaking authority under sections 224(b)(2) and 224(e)(1) is subsidiary to its primary task: hearing and resolving complaints. The statute gives the Commission virtually no authority to regulate the utility's relationship with other partiesThe only exception is that, under 47 U.S.C. § 224(h), the

Section 224(i) provides no basis at all for the proposed clearinghouse mandate. Section 224(i) provides, in relevant part, that an existing attaching entity "shall not be required to bear any of the costs of rearranging or replacing its attachments, if such rearrangement or replacement is required as a result of an additional attachment … sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."[106] Thus, 224(i) simply means that an existing attacher is not required to bear the costs of moving its attachments to make room for a new attacher. It says nothing about who is required to bear such costs or how the costs should be administered.[107]

3. The proposed clearinghouse mandate is an arbitrary and capricious departure from existing Commission policy.

The policy goal of the FNPRM's transfer funds clearinghouse proposal is not clearly specified, except that the discussion of the proposal falls under the section heading "Other Options to Expedite Pole Access." Assuming the purpose of the proposal is to "expedite pole access," the FNPRM provides no evidence that the proposed clearinghouse mandate would achieve this purpose. The FNPRM seems to presuppose that utilities are somehow slowing access by failing to "manage" the transfer of existing attachments. To the extent there is a

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pole owner, whenever it "intends to modify or alter such pole … shall provide written notification of such action to any entity that has obtained an attachment … so that such entity may have a reasonable opportunity to add to or modify its existing attachment." This provision says nothing about collection and distribution of costs owed by the applicant to the existing attacher. Written notice neither requires nor suggests that the utility should have any further responsibility towards the existing attacher or, *a fortiori*, towards any new applicant.

[106] 47 U.S.C. § 224(i).

[107] In any event, the Commission seems to assume that privity of contract would allow an electric utility to undertake such actions. In fact, attachment agreements often do not allow the utility to engage in "self-help." Privity would only matter to the extent the right exists in the contract.

problem with transfer delays, the problem lies not with the utility but with the existing attaching entities who fail or refuse to make room for their competitors in a timely manner.

It would be arbitrary and capricious for the Commission to compel electric utility pole owners to operate as the clearinghouse in settling accounts between competing broadband providers. As the FNPRM acknowledges, electric utilities are not the "culprit" and should not be made accountable for the anticompetitive behavior of other parties. In the experience of the Alliance, applicants often fail to take responsibility for coordinating with existing attaching entities and then blame the utility when the existing attachers' facilities are not transferred in time to make room for the applicant's facilities.

The Commission has never previously required pole owners to serve as the clearinghouse for attachment rearrangement payments. On the contrary, the proposed mandate is another example of the FNPRM's proposed radical break from the Commission's established practice of case-by-case evaluation of disputes over make-ready charges and access issues. The Commission's existing regulations nowhere mention a duty to "manage" or "administer" the pole nor, specifically, to manage the allocation of costs associated with transfer of existing attachments. The matter of which party is tasked with collecting and distributing such funds is not addressed at all. Instead, the rules simply provide that the party that obtains access at the existing attachers' expense must reimburse those attachers for the costs they incur to move their existing attachments.[108]

[108] Existing Commission rule 1.1416(b) only provides, in relevant part, that "a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party." Correlatively, the rule provides that "[t]he costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification …." *See* 47 C.F.R. § 1.1416(b).

4. The Commission should clarify that, where the utility consents to act as the "clearinghouse," it should be fully compensated for costs attributable to such role.

The Commission has no authority to require a utility to act as a clearinghouse. However, the final rule should clarify that a utility *may* act as clearinghouse with respect to transfer costs and that, where the utility chooses to act in such capacity, it is just and reasonable for the utility to charge the applicant for all costs attributable to providing this service, including a reasonable carrying charge for the cost of capital. *Black's Law Dictionary* defines "clearinghouse" as "a place where banks exchange checks and drafts and settle their daily balances."[109] Where the utility provides such a banking service, it should be fully and fairly compensated for providing that service.

D. Use of Third-Party Contract Workers

The FNPRM proposes to require electric utilities to allow approved third-party contractors to perform surveys and make-ready work, post a list of approved contractors, and post the utility's standards for evaluating contractors.[110] Utilities would have discretion to design contractor training requirements "as they see fit"[111] and would have the right to direct and supervise the contractor at the invitation of the attaching entity.[112] The Commission also seeks comment on whether the contractor list should include a minimum number of contractors and whether there should be a presumption that contractors that are approved and certified by a utility other than the pole owner be acceptable for make ready work.[113]

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[109] BLACK'S LAW DICTIONARY 245 (7th Ed. 1999).

[110] Order and FNPRM at para. 61.

[111] *Id.* at para. 62.

[112] *Id.* at para. 67.

[113] *Id.* at para. 64.

The Alliance agrees with the Commission that electric utilities should have the right to approve and certify third-party contractors, establish training standards for such contractors, and supervise surveys and make-ready work performed by contractors. As an alternative to the proposed rule, the Alliance urges the Commission to leave the details governing the use of third-party contract workers to the negotiated agreements of private parties.

The Alliance opposes the FNPRM's proposal to require electric utilities to allow attaching entities to use third-party contractors for surveys and make-ready. Attaching entities have no right under section 224 or existing Commission regulations to use contractors for surveys or make-ready. The Alliance also opposes the suggestion that each utility must approve a minimum number of contractors and that a contractor approved by one utility should be presumed approved by all other utilities.

1. Requiring electric utilities to allow the use of third-party contractors for surveys and make-ready work exceeds the Commission's authority under section 224.

Access and make-ready are not the same thing. Section 224 provides nondiscriminatory access to poles *for purposes of making pole attachments* where a utility has determined that there is sufficient capacity for the attachment and that the attachment can be made without jeopardizing safety, reliability, or sound engineering. The statute does not provide an open-ended right of the attaching entity to perform pre-attachment activities that are necessary to make the pole accessible for attachment purposes.

The utility's right to deny access pursuant to section 224(f)(2) presupposes the right to evaluate the capacity, safety, reliability, and engineering of its own pole infrastructure. As the FNPRM states, "[c]rucial judgments about safety, capacity, and engineering are made during

surveys and make ready …."[114] For the Commission to purport to compel the utility to allow third-party contractors to perform surveys and pole construction would render meaningless the utilities' right to deny access.

2. The Commission should not arbitrarily trump case-specific facts by dictating a minimum number of authorized contractors or presuming that an acceptable contractor in one place is acceptable everywhere.

The Alliance opposes the suggestion that there should be a "minimum number" of contractors on a utility's list of authorized contractors. A utility cannot control or dictate to the private market for contracting services that there be available a minimum number of contractors who meet the utility's training requirements. The lack, in a given geographic market, of a multitude of companies that have qualified personnel who can safely do the make-ready work in compliance with the utility's standards must not mean that the utility should be forced to jeopardize the safety of its facilities by allowing unqualified or incompetent workers to access its poles. Requiring a minimum number of contractors would render meaningless the utility's right to deny access for reasons of safety under section 224(f)(2).

The Alliance also opposes the suggestion that a contractor approved and certified by one utility should be presumed acceptable for make-ready work on another utility's poles. Such a presumption would contradict the basic notion that the individual utility has the right to approve and certify the contractor in question to work on the utility's own poles. If, as the FNPRM states, the utility is permitted to establish training standards "as it sees fit," it must also be permitted to *apply* those standards to all contractors, regardless of whether a particular contractor has been approved somewhere else.

[114] Order and FNPRM at para. 61.

E. Contractor work "among" the electric lines.

The Alliance supports the Commission's proposed clarification of the term "proximity of electric lines" and agrees with the Commission that communications workers should work "among" electric lines only in concert with the utility's workforce and when the utility deems it safe. However, the Alliance is concerned that the Commission's proposal to *require* utilities to allow communications workers to work among electric lines contradicts the Commission's purported clarification of "proximity." A better, clearer approach would be for the Commission to reaffirm its approach in the Local Competition Order: contract workers working in the proximity of electric lines should be required to have the same qualifications as the utility's own electric-qualified workers. With regard to work "among" the electric lines, the Commission should simply allow the utility to determine when or whether to allow properly qualified contract workers to work within the electric supply space.

1. The proposal to allow non-qualified workers among the electric lines contradicts the FNPRM's clarification of the term "proximity."

The FNPRM proposes to "clarify" that the term "proximity of electric lines" "extends into the safety space between the communications and electrical wires but, [sic] not among the lines themselves."[115] The Alliance agrees with the Commission's proposed clarification that the term "proximity of electric lines" be limited, in other words, to the communication worker "safety space below the electric space."[116] As the FNPRM notes, the Commission concluded in the *Local Competition Order* that "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own

[115] *Id.* at para. 69 and fn. 188 (*citing* Local Competition Order at para. 1182).

[116] *Id.* at para. 69.

workers …."[117] The Commission should simply reaffirm that ruling. Instead, the FNPRM seems to be proposing that contract workers who work in proximity of electric lines (i.e., within the communications worker safety space) must have the same training as electric workers, whereas certain contract communications workers who do *not* have the same training as electric workers should be allowed to work *among the electric lines*. This is a contradiction. If contractors working in the proximity of (i.e., below) the lines should have the same training as electric utility workers, then, all the more so, such contractors should have the same qualifications as electric utility workers to work up *among* the electric lines.

At a minimum, the Alliance requests that the Commission should clarify that the communications workers allowed to work in the proximity of the electric lines (or, at the utility's discretion, among the electric lines) must also be electric-qualified and have the proper training[118] to be allowed to work. The Alliance also asks that the Commission clarify that the proposed rule does not imply a right to make attachments among the electric lines.

2. The right to deny unqualified workers from working among, or in the proximity of, the electric supply space goes to the core of the utility's right to deny access for safety reasons.

Under section 224(f)(2), the utility has a right to deny access for reasons of safety. Having workers who are not electric-qualified to work among, or in the proximity of, electric lines presents obvious safety concerns. Accordingly, a utility has a statutory right to exclude non-electric-qualified workers from working among, or in the proximity of, electric lines. In

[117] *Id.* at para. 69 (*citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, Order on Reconsideration at paras. 86-87, FCC 99-266 (1999) ("Local Competition Reconsideration Order").

[118] E.g., being on the utility's switching list for feeders, having the proper communication tools and terminology to communicate with the dispatcher, and understanding and working within the electric utility's safety rules.

recognition of this right, the Commission should affirmatively clarify that a utility may exclude, without exception, non-qualified contract workers from working among, or in the proximity of, electric lines if it deems that such access is inherently unsafe.

F. Data Collection

The FNPRM seeks comment on how the Commission can "improve" the collection and availability of information regarding the "location and availability" of poles, ducts, conduits, and rights-of-way, including who should collect such information, whether there should be a "national database," and who is responsible for associated costs. The FNPRM specifically asks whether the Commission itself should collect this data or is "industry" better suited to the task[119] and what is the "appropriate role for the Commission regarding the establishment of common standards and oversight." The Commission proposes no new rules, but appears nevertheless to envision a role in regulating, and presumably requiring, the establishment and maintenance of a national database.

As an alternative to the database, the Alliance urges the Commission to allow the private parties to negotiate the terms of information disclosure on a case-by-case basis. The Alliance rejects the proposed database mandate because it exceeds the Commission's statutory authority and represents a stark departure from the Commission's prior case-by-case approach to pole attachment access disputes.

1. The proposed database mandate exceeds the Commission's statutory authority.

In section 224, Congress granted the Commission a simple and sufficient authority: to hear and resolve complaints about pole attachment rates, terms, and conditions. The Commission has no open-ended authority to impose an *ex ante* regulatory regime outside the

[119] *Id.* at para. 75.

context of specific complaints. Specifically, the notion that the Commission could, by regulatory fiat, bring into being a vast, publicly available, real-time database of the specific configurations and locations of each of hundreds of millions of poles nationwide, apart from being impracticable, could hardly be farther outside the bounds of its authority. A public database is simply not a "rate, term, or condition" of a pole attachment agreement and is therefore beyond the scope of the Commission's authority.

The proposed mandate to amass and maintain a database of such information is utterly opposed to Congress's design to provide for administrative simplicity in Federal pole attachment regulation. The legislative history shows that Congress did not intend that the Commission "embark upon a large-scale ratemaking proceeding in each case brought before it, *or by general order*."[120] A massive database of the "location and availability" of poles, ducts, conduits, and rights-of-way mandated by general order would be as complex as—if not far more so—than a "large-scale ratemaking proceeding." Accordingly, for simplicity's sake, the Commission should forego a database mandate.

2. The database proposal represents an arbitrary and capricious departure from the Commission's well-established case-specific approach to pole attachment rates, terms, and conditions.

The Commission has not previously attempted to mandate public disclosure of the pole owner's infrastructure data. The Commission has only offered general guidelines applicable *in the context of a specific complaint* filed after a "*legitimate inquiry*."[121] The Commission has also made clear that the inquiring entity must reimburse the utility for the entire "actual labor and

[120] *Id.* at para. 135 (*citing* Sen. Rep. No. 95-580 at 23).

[121] Local Competition Order at para. 1223 (stating: "[w]e expect a utility that receives a *legitimate inquiry* regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, *subject to reasonable conditions to protect proprietary information*.") (emphasis added).

administrative costs" associated with providing such data.[122] Furthermore, as the court in *Texas Power & Light v. FCC* recognized, requiring utilities to submit pole-by-pole data even in a specific case would be extremely costly and burdensome, and would require physical inspection of each pole.[123] Rejecting all precedent and prudence, the FNPRM now proposes the opposite approach: each utility must collect information on all of its poles and post that information in a "national database" regardless of whether there are *specific complaints* or *specific requests* regarding any specific poles. The FNPRM also proposes that the utility would be expected to bear at least some "share" of the costs of such database, despite the fact that the "cost causer" in this case is entirely the attaching entity.[124]

II. ENFORCEMENT

A. Refunds Calculated from Date Disputed Rate Was First Paid

Under existing Commission rule 1.1410(c), refunds are calculated from the date the complaint is filed. The FNPRM proposes to eliminate this restriction and instead allow the

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[122] Local Competition Reconsideration Order at para. 107 ("We … clarify that a utility may require an inquiring entity to reimburse the utility, on an actual cost basis, for the actual labor and administrative costs incident to providing maps, plats, and other data to entities making inquiries regarding access, because such one-time expenses would not typically be provided for in an attaching entities' rent.").

[123] *Texas Power & Light v. FCC*, 784 F.2d 1265 at 1274-75 (1986) ("In the communities in question here, Group W has attached its distribution lines to approximately 5,645 poles owned by Texas Power, and the utility company alleges in its brief that about 3,000 unauthorized attachments by Group W exist. If Texas Power were required to submit community-specific right-of-way information for each of the eighty communities in its service area with cable attachments, the expense would be truly burdensome. Texas Power would be required to examine each right-of-way land record in its files, determine the exact location of the parcel (many times by reference to metes and bounds), and then physically inspect each parcel to determine whether a cable attachment is on that pole.")).

[124] Order and FNPRM at para.76 ("How can we ensure that the costs are *shared equitably by pole owners* and other users of the data?" (emphasis added)). The FNPRM seems to assume that the utility is the primary "user" of such data, whereas the utility would have no need for the database at all absent communications attachers.

refund to be calculated "consistent with the applicable statute of limitations."[125] The Alliance objects to this proposed rule change because it would discourage timely filing of complaints and lead to abuses of the complaint process. The Alliance also notes that, at the same time the FNPRM is proposing to subject utilities to rigid make-ready timelines, it frees attachers from all ascertainable time limits for filing complaints.

The proposed change also represents a stark, unjustified departure from the Commission's existing rule, which has been in place for in excess of three decades. In the 1978 Order, a commenter suggested that refunds should be calculated from the date the disputed rate was first paid.[126] The Commission, however, agreed with NCTA that "refunds from the date of complaint are entirely appropriate in a complainant form of regulation" and concluded that "[i]n order to avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator, we have modified this section as proposed by NCTA."[127] Consistent with this finding, the Commission's original refund regulation provided for refund calculation from the date of the complaint. Although the refund regulation (sec. 1.1410) was subsequently modified in other respects, the date-of-complaint requirement remains. The FNPRM provides no justification for eliminating the refund date language from section 1.1410(c) and the risk remains that attachers will abuse the process. Accordingly the Commission should not adopt the proposed refund change.

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[125] Order and FNPRM at para. 88 and Appendix B at proposed rule 1.1410(c).

[126] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order at para. 45, FCC 78-594 (1978) ("1978 Order").

[127] *Id.*

B. Elimination of 30-Day Deadline for Filing Complaints

The FNPRM proposes to eliminate the requirement of existing Commission rule 1.1404(m) that pole attachment complaints be filed within 30 days of the alleged denial of access.[128] If this rule were adopted, there would then be no limit to the length of time between the alleged denial of access and the date of the complaint. Combined with the FNPRM's proposal to eliminate the complaint date refund calculation rule, the proposal would reduce regulatory certainty, encourage abuse of the Commission's complaint process, and potentially deny utilities due process. Accordingly, the Alliance objects to the proposed rule change.

C. Compensatory Damages

The FNPRM further proposes amending section 1.1410 to provide for awards of compensatory damages where "unlawful denial or delay of access" or an unjust or unreasonable rate, term, or condition is found. The stated purposes of this rule change are to provide a "disincentive to pole owners to obstruct access," to ensure that the attacher is "made whole" for the delay it has suffered, and, in the case of an unjust or unreasonable term or condition that does not involve payments to the pole owner, to provide "just compensation" to the attacher.[129] For example, an "unreasonable ban on boxing" could increase the charges an attacher must pay "third parties to attach its facilities to poles."[130]

The Alliance opposes the proposed compensatory damages rule because the proposal: exceeds the Commission's statutory authority under the Communications Act; and would be an arbitrary and capricious departure from prior policy without factual justification.

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[128] Order and FNPRM at para. 82.

[129] *Id.* at para. 86.

[130] *Id.*

1. The Commission should, to the extent of its authority, provide for compensatory damages against the parties that have an incentive to engage in anticompetitive behavior: existing common carrier communications attachers.

The proposed rule is too broad because it applies to electric utilities and too narrow because it does not apply to existing attaching communications companies. As an alternative to the proposed rule, the Alliance suggests that the Commission address the underlying issue of anticompetitive behavior by ILEC pole owners or existing communications attachers by clarifying that applicants may seek compensatory damages against such entities pursuant to applicable provisions of the Communications Act. Although the Commission has no authority to award damages against pole owners under section 224, it has ample authority under section 207 to award damages against ILEC pole owners, ILEC attachers, and any other "common carriers" that have an incentive to obstruct or delay pole access by potential competitors.[131]

2. The proposed rule exceeds the Commission's authority under the Communications Act of 1934.

Section 224 makes no provision for compensatory damages. Elsewhere in the Communications Act, where Congress has intended to allow the Commission to assess damages, it has expressly provided for such assessments.[132] The Commission's authority under section 224 is limited to hearing and resolving complaints "concerning" rates, terms, and conditions for pole attachments. Section 224 provides no authority to "make whole" or otherwise "compensate" an attaching entity with respect to lost business opportunities or increased expenses the attacher might incur by, for example, choosing the costlier alternative of attaching on third-party facilities at unregulated rates.

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[131] 47 U.S.C. § 207 (stating that "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission …").

[132] *See, e.g.*, 47 U.S.C. §§ 207, 227, and 274.

In support of its proposed rule, the FNPRM cites the Commission's authority to "take such action as it deems appropriate and necessary, including issuing cease and desist orders."[133] An assessment of compensatory damages is, first of all, not a cease and desist order. More generally, the authority to take such action as the Commission deems "appropriate and necessary" does not encompass an authority to assess compensatory damages for two reasons.

First, the Administrative Procedure Act (APA) provides that "[a] sanction may not be imposed … except within jurisdiction delegated to the agency and as authorized by law."[134] "Sanction" is defined to include "assessment of damages."[135] Neither section 224 nor the Communications Act otherwise authorizes the Commission to assess damages against an electric utility pole owner. Therefore, a rule purporting to provide for assessment of compensatory damages under section 224 would violate the APA restriction on agency sanctions.

Second, the "action" the Commission is authorized to take is solely with respect to ensuring that rates, terms, and conditions are "just and reasonable." The "just and reasonable" standard is a standard for judging the appropriate level of compensation owed to a utility under the 5th Amendment.[136] The determination of whether a rate, term or condition is just and reasonable has nothing to do with compensation for, or damaged incurred by, the attaching entity. Accordingly the action the Commission deems "appropriate and necessary" must be action taken to ensure that rates, terms and conditions are just and reasonable within the limited meaning of such standard.

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[133] Order and FNPRM at para. 83 (*citing* 47 U.S.C. § 224(b)).

[134] 5 USC § 551(10)(E).

[135] *Id.*

[136] *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

3. The proposed rule as applied to electric utilities would be arbitrary and capricious because it contradicts the Commission's own finding that electric utilities have no incentive to block or delay access.

The policy basis of the proposed compensatory damages rule is that "a utility that competes with the attacher may calculate that the cost of defending an access complaint before the Commission, even if it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival's build-out plans."[137] The proposed compensatory damages rule, however, applies not only to utilities that compete with attacher, but also to electric utilities. Applying the rule electric utilities contradicts the FNPRM's own factual conclusion that electric utilities have no incentive to obstruct access, whereas ILECs do have such an incentive.[138] Because the proposed rule, as applied to electric utilities, contradicts the Commission's own factual findings, it is arbitrary and capricious.

D. Unauthorized Attachments

The FNPRM seeks comment on "how best to address the problem of unauthorized attachments"[139] and specifically seeks comment on penalty limits specified in the regulations of the Oregon Public Utilities Commission.[140] The Alliance agrees with the Commission that unauthorized attachments are a serious problem and offer the following comments on how best to address this problem.

1. Unauthorized attachments jeopardize both safety and reliability and broadband competition.

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[137] Order and FNPRM at para. 86.

[138] "In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment." *Id.* at para. 68.

[139] *Id.* at para. 91.

[140] *Id.* at para. 96.

The Alliance agrees with the Commission, that "the dangers presented by unauthorized attachments transcend the theoretical."[141] Such attachments, the Commission affirms,

> "can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC."[142]

The prevalence of unauthorized attachments is due to the simple fact that "communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would."[143]

The Commission is correct to ask about unauthorized attachments in the context of safety and reliability. However, due to the incentive to "roll out service as quickly as possible," unauthorized attachments may also affect competition among broadband service providers. Making attachments without notice to the utility also means that the attaching entity pays no rent for the attachment unless and until it is "caught" by the utility. When some attaching entities do not pay rent for some of their attachments, while other attaching entities "play by the rules," the "distortionary effects arising from the differences in current pole rental rates" are exacerbated.[144]

2. The problem of unauthorized attachments is severe.

As numerous comments filed in this proceeding demonstrate, unauthorized attachments are a serious problem.[145] The fact that there are unauthorized attachments is not disputed. As the

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[141] *Id.* at para. 91.

[142] *Id.*

[143] *Id.* at para. 67.

[144] *Id.* at para. 110.

[145] *See, e.g.,* EEI NPRM Comments at 31-41; Comments of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services Company, PPL Electric

FNPRM acknowledges, many utilities report that 30 percent or more communications attachments on their poles are unauthorized. Even the utilities that report "significantly lower" rates of unauthorized attachments estimate that between two and six percent of all their attachments are unauthorized—a staggering figures when it is considered that major investor owned utilities typically own anywhere between several hundred thousand and more than a million distribution poles, with a correspondingly large number of attachments.

3. Five years' back rent is not a sufficient deterrent.

The FNPRM cites its decision in *Mile Hi Cable Partners* for the proposition that a "reasonable penalty" cannot exceed an amount equal to "the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest …."[146] However, as explained in filings in this proceeding by EEI, several of the Alliance companies, and other electric utilities, a "penalty" consisting of nothing more than annual back rent since the most recent inventory is not a sufficient penalty because it typically results in a payment of nothing more than the cumulative total of back rent owed to the utility. Utilities typically inventory their poles on a five-year cycle. As a result, unauthorized attachments often remain on the poles for up to five years or—if the utility's inventory cycle is longer than five years—potentially even longer. It should be emphasized that, under *Mile Hi*, five years is the maximum. If the most recent inventory was more recent, the penalty is lower. If the most recent inventory was more than five years back, the utility would potentially not even be allowed to

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Utilities Corporation, Progress Energy, Southern Company, and Xcel Energy Services, Inc. at 9-18 (filed March 7, 2008); Comments of Georgia Power Corporation at (filed March 7, 2008); Comments of Oncor Electric Delivery Company at 10-17 (filed March 7, 2008).

[146] *Id.* at para. 92 (*citing Mile Hi Cable Partners et al. v. Public Serv. Co. of Colorado*, File No. PA 98-003, Order, 15 FCC Rcd 11450, 11458 at para. 14 (Cab. Servs. Bur. 2000)).

recover all back rent owed. The net effect is that, as EEI has observed, the amount allowed under *Mile Hi* "is not a penalty at all."[147]

The FNPRM is correct to call into question the five-time back rent approach, because: "it appears that penalties amounting to little more than back rent may not discourage non-compliance with authorization processes."[148] The reason why a back-rent-only "penalty" is inadequate is simple: "competitive pressure to bring services to market may overwhelm the deterrent effect of modest penalties.[149]

4. The Commission should clarify that electric utilities are permitted to incorporate the Oregon penalty amounts as just and reasonable terms of privately negotiated pole attachment agreements.

The best approach to addressing the problem of unauthorized attachments is to allow the utility in its discretion to specify sufficiently deterrent penalties as conditions for attachments. Within that framework, the Alliance supports the penalty limits specified in the regulations of the Oregon Public Utilities Commission, with appropriate modifications for application at the Federal level. The Alliance specifically endorses the schedule of penalties set forth in EEI's NPRM comments, which are modeled on the amounts specified under the Oregon regulations.[150]

The FNPRM also seeks comment on how the Oregon penalties could be enforced—"through provisions in pole attachment agreements, through the complaint resolution mechanism in section 224 of the Act, or through both?"[151] Where unauthorized attachments are made by parties that have no agreement with the utility, payment of appropriate penalties and back rent

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[147] *Id.* at para. 93 (*citing* EEI NPRM Comments at 77).

[148] *Id.* at para. 94.

[149] *Id.*

[150] EEI NPRM Comments at 79-80.

[151] Order and FNPRM at para. 97.

should be required as a condition for attachment. Such penalties should be enforced primarily through pole attachment agreement provisions. However, utilities should also have the option of filing complaints with the Commission against unauthorized attachers.

5. Law-abiding attachers should be permitted to seek compensatory damages from unauthorized attachers who gain an unfair competitive advantage at their expense.

In addition, attaching entities that "play by the rules" should have the option of seeking compensatory damages against their competitors who gain an unfair competitive advantage by making unauthorized attachments. Although the Commission has no authority to assess damages pursuant to section 224, the Commission has ample authority under section 207 and potentially other provisions of the Communications Act to provide for damages awards against common carriers or other broadband providers.

III. RATES

The FNPRM seeks comment on "ways to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework."[152] The FNPRM specifically seeks comment on several rate proposals, as well as on "other alternative approaches to reinterpreting the telecom rate formula within the existing statutory framework."[153]

Alliance members and EEI have previously filed alternative proposals that would reduce "distortionary effects" of different pole attachment rates by requiring cable broadband providers to pay the same telecom rate as their CLEC competitors.[154] As a just and reasonable alternative

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[152] Order and FNPRM at para. 110.

[153] *Id.* at para. 126.

[154] *See In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over*

to the FNPRM's proposed rate methods, the Alliance urges the Commission to adopt the Alliance and EEI positions.

The FNPRM does not specifically seek comment on or even acknowledge the Alliance companies' VoIP Petition or the EEI rate proposal. Instead, the FNPRM seeks comment on several proposals by USTA, Verizon-AT&T, TWTC and on the Commission's own "low-end" rate proposal. The common element of these proposals is to provide rates that are "as low and as close to uniform as possible."[155] Additionally, the Commission asks if it would be possible for the Commission to "forbear" from applying the section 224(e) telecom rate and adopt a different rate "such as the cable rate."[156]

The Alliance objects to the USTA, Verizon-AT&T, TWTC, low-end telecom rate, and forbearance proposals for the reasons set forth below and urges the Commission instead to adopt the pro-competitive and pro-consumer proposals already advanced by Alliance members and EEI.

A. The Alliance and EEI proposals provide a just and reasonable alternative consistent with the Commission's statutory authority.

The Alliance agrees with the Commission that different rental rates for jurisdictional pole attachers (i.e., cable systems and "telecommunications carriers" within the meaning of section 224) can have "distortionary effects" on broadband deployment. Specifically, the historic cable rate subsidy gives cable system broadband providers an unfair advantage relative to their CLEC

Internet Protocol Service, WC Docket No. 09-154, Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc., (filed August 17, 2009) ("VoIP Petition"); EEI NPRM Comments.

[155] Order and FNPRM at para. 20.

[156] *Id.* at para. 142.

competitors, who are subject to the telecom rate.[157] To address this problem, and to minimize subsidies provided to the cable industry at the expense of electric consumers, several Alliance member companies last year filed a petition for declaratory ruling requesting the Commission to clarify that the section 224(e) telecom rate applies to cable attachments used to provide VoIP broadband service.[158] The Alliance hereby incorporates by reference the VoIP petition into these comments.[159]

As explained in the petition and supporting comments, the Commission has a statutory duty under section 224(e) to provide for non-discriminatory rates for all pole attachments used to provide commingled cable and other services, such as VoIP.[160] This obligation applies regardless of whether VoIP or broadband generally are ultimately classified as telecommunications services. A non-discriminatory rate formula simply means the same rate formula. Thus, because section 224(e) binds the Commission to apply the telecom formula to telecommunications carriers providing telecommunications services, the nondiscrimination

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[157] The Alliance notes that, although the cable rate subsidy is larger than the subsidy provided by the telecom rate, the telecom rate is nevertheless inherently a subsidy rate because it allocates only two-thirds of the common-space costs of the pole among attaching entities. As the telecom rate is currently applied, the utility must absorb not only an "equal share" of the common-space costs, but also an entire third of such costs, regardless of the number of attaching entities. As the House report shows, all attachers benefit equally from the use of the pole, but Congress nevertheless chose to allocate a greater share of the common costs to the pole owner. *See* H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555 the Communications Act of 1995 at 91 (July 24, 1995) ("H. Rpt. 104-204"). The EEI proposal would minimize the subsidy effects of the telecom rate by providing for presumptions that more closely reflect reality.

[158] VoIP Petition at 18.

[159] The VoIP Petition is included as an attachment to these comments.

[160] *See,* VoIP Petition; *In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc., (filed October 9, 2009).

mandate requires that the same formula apply to cable companies that also provide telecommunications services.[161]

Additionally, the EEI proposal would reduce the remaining subsidies inherent in the telecom rate by modifying several presumptions used in the telecom rate formula to better reflect reality.[162] The Alliance hereby incorporates by reference the EEI comments in response to the Commission's 2007 *Notice*.[163] Consistent with EEI's previously filed proposal, the Alliance urges the Commission to make the following modifications to the presumptions and general rules relied upon in calculating pole attachment rates under the telecommunications formula: (1) allocate the communications worker safety zone space to common (i.e., "other than usable") space to require communications attachers, whose workers the safety zone was created to protect, to pay for an equal share of the cost of that space; (2) lower the presumed numbers of rural and urban attaching entities per pole to two (excluding the utility itself) to reflect actual prevailing conditions; (3) do not count the utility as an "attaching entity" in calculating the allocation of common space; (4) ensure that space allocation reflects the number of attachments; and (5) clarify that space allocations for special types of attachments must reflect the full amount of space occupied.

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[161] As expressly provided in section 224(d), the historic cable rate would apply only to cable attachments used "solely to provide cable service." *See* 47 U.S.C. § 224(d).

[162] *See, e.g., In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of the Edison Electric Institute and the Utilities Telecom Council at 102-110 (filed March 7, 2008).

[163] *Id.*

B. The USTA and AT&T Verizon proposals are inconsistent with the statute to the extent they apply to ILEC attachments on electric poles.

The USTA proposal would establish a uniform space allocation for all attaching broadband providers (including ILECs) using a formula that is neither the 224(d) cable formula nor the 224(e) telecom formula. The Verizon-AT&T proposal is similar to the USTA proposal, but would allocate a higher percentage of pole costs to each attaching entity. The Alliance categorically rejects the suggestion that these proposed rate formulas somehow could or should apply to ILEC attachments on electric poles. As a matter of law, ILEC attachments are not jurisdictional "pole attachments" under section 224 and, accordingly, the Commission has no authority to extend a regulated rate to such attachments. As a matter of sound policy, there is no reason for the Commission to give ILEC attachments the "same" rate as cable and CLEC attachers—or to regulate ILEC attachments at all—because ILECs are still pole owners and their attachments are subject to existing joint use agreements with electric utilities.[164]

C. The TWTC proposal is blatantly contrary to the statute.

TWTC essentially proposes to exclude all but incremental costs from the calculation of the telecom formula.[165] The Alliance objects to the TWTC proposal because it would "reinterpret" the section 224(e) telecom formula in a manner that is blatantly contrary to the statute in two basic respects, and thereby deepen and expand rate subsidies at the expense of electric consumers.

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[164] See EEI NPRM Comments at 110-127 for a discussion of the policy reasons for why ILEC attachments should not be regulated by the FCC.

[165] TWTC proposes that "utilities should determine 'how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments … and then fully allocate those costs based on the cost-allocation formulas under Section 224(e)(2) and (3).'" Order and FNPRM at para. 125 (*citing* TWTC White Paper, RM-11293, at 20).

First, TWTC's proposal to exclude all but incremental costs from the calculation of the telecom formula would result in recovery by the utility of even less than the incremental costs of the attachment, resulting in an unconstitutional taking.[166] Accordingly, as the FNPRM rightly concludes, the TWTC proposal would be inconsistent with the requirements of section 224(e), which expressly "allocates portions of the relevant 'cost' to both the pole owner and the attachers."[167]

Second, even if TWTC's proposal were to provide for full recovery of incremental costs, it would fall far short of the requirements of section 224(e). TWTC specifically proposes to exclude rate of return, depreciation, and taxes—i.e., most of the total cost of the pole—from the cost basis of the telecom formula. TWTC contends that "none of these 'costs' has anything to do with actually providing 'space' on a pole for pole attachments because a utility would incur these costs 'regardless of the presence of pole attachments.'" TWTC's approach presupposes that only costs caused by the attaching entity should be included in the telecom formula calculation. However, as explained below in the discussion of the Commission's low-end rate proposal, the statutory telecom formula provides for an allocation of the actual expenses and capital costs of the whole pole, not merely incremental costs.

Accordingly, both for the reasons the Commission itself identifies in the FNPRM and because the TWTC erroneously excludes the actual costs of the pole, the Alliance urges the Commission to reject the TWTC rate proposal.

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[166] Order and FNPRM at para. 126.

[167] *Id.* (stating that "[w]e thus believe the defining the 'cost of providing space' as incremental cost in the manner TWTC seems to suggest would be inconsistent with the section 224(e) framework, given the manner in which the statutory provision allocates the relevant 'costs.'").

D. The FNPRM's low-end rate proposal is contrary to the statute and is an arbitrary and capricious departure from well-established Commission policy.

The FNPRM seeks comment on "ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission's current rules."[168] However, the FNPRM's specific "low-end" rate proposal "reinterprets" the telecom rate formula to an extent that would represent a radical departure from existing practice and would no longer be recognizable as the statutory telecom formula. Specifically, under the FNPRM's proposal, "capital costs would be excluded for purposes of identifying a lower bound for the telecom pole rental rate."[169]

The Alliance objects to the FNPRM's "low end" rate proposal because like the TWTC proposal, it is contrary to the plain text, structure and legislative history of section 224. The low-end proposal also represents an arbitrary and capricious departure from prior Commission policy.

1. The low-end rate proposal is contrary to section 224.

The Alliance agrees that rate policies intended to promote broadband must be "consistent with [s]ection 224 of the [Act]."[170] Although the FNPRM wisely eschews the sheer crassness of TWTC's proposal, the Commission's proposal shares the same fundamental flaw: it turns a statutory capital cost rate into an incremental cost rate.

The FNPRM seeks comment on whether "exclusion of capital costs from the lower bound telecom rate under this approach is consistent with … the existing section 224

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[168] *Id.* at para. 122.

[169] *Id.* at para. 135.

[170] *Id.* at para. 115 (*citing* National Broadband Plan at 110).

framework."[171] Specifically, the FNPRM asserts authority to choose a range of possible interpretations, "from the current application of the telecom rate formula at the higher end of the range, to an alternative application of the telecom rate formula based on cost causation principles at the lower end."[172] The FNPRM concludes that the Commission has discretion to exclude capital costs from its calculation of the section 224(e) telecom rate formula and concedes that the resulting low-end "telecom rate" could be even lower than the cable rate.[173]

The Alliance objects to the proposed low-end methodology because it exceeds the Commission's authority under section 224. Specifically, the text, structure, and legislative history of section 224 show that: (1) the telecom rate formula is intended to result in higher rates than the rates yielded using the historic cable rate formula; (2) the term "cost" in section 224(e) is intended to include actual capital costs of the whole pole, duct, conduit, and right-of-way; (3) section 224(e) provides for a specific allocation formula, not a cost-causation approach; (4) under 224(e), in contrast to 224(d), the Commission has no discretion to choose a rate between low-end and high-end approaches; (5) up-front payment of make-ready capital costs does not compensate the utility for capital costs properly included in annual rates; and (6) taxes are capital costs and must be included in the telecom rate base.

a. The text, structure, and legislative history of section 224 show that Congress intended the telecom rate to be substantially higher than the cable rate.

The FNPRM acknowledges that, "[a]s the Commission has implemented these statutory formulas, the telecom rate formula generally results in higher pole rental rates than the cable rate

[171] *Id.* at para. 136.

[172] *Id.* at para. 128.

[173] Order and FNPRM at para. 133 (stating that "we propose that a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit.").

formula."[174] The Commission nevertheless now proposes to turn the cable-telecom rate distinction upside down, going so far as to seek comment on whether the "cable rate will be higher than the telecom rate calculated using only maintenance and administrative expenses."[175] The FNPRM's proposal is contrary to the text, structure, and legislative history of section 224, which show that the telecom rate is necessarily a higher rate than the historic cable rate. Any interpretation of section 224(e) that would result in a rate equal to or lower than the cable rate is both contrary to the plain text of, and an unreasonable construction of, section 224.

(i) The structure of the statute shows that the sole point of the cost-allocation language in section 224(e) is to allocate a larger share of common space costs and, thereby, yield a rate higher than the cable rate.

The differing cost-allocation methods provided for in section 224 show that it is logically necessary that the 224(e) telecom rate formula yield a higher rate formula than the 224(d) cable rate formula. The cable formula, at its higher end, provides for an allocation of the costs of the whole pole in proportion to the amount of space occupied. By contrast, the telecom formula allocates the cost of usable space in proportion to space occupied, but allocates a much larger share of the costs of the common space to each "attaching entity."[176]

A basic canon of statutory construction is that every word of the statute must be given meaning.[177] Applying this canon to the cost allocation language of section 224(e) as compared to that of 224(d), it appears that the whole point of the section 224(e) formula is to allocate a larger share of the common space to each attaching entity and, in turn, to yield a higher rate than

[174] Order and FNPRM at para. 113.

[175] *Id.* at para. 140.

[176] Under 224(e), the usable space apportionment "equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities." 47 U.S.C. § 224(e).

[177] *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

the cable rate. By providing for a different space allocation, Congress intended to provide for a different rate. If the term "costs" in section 224(e) were construed to mean anything other than the sum of operating expenses and actual costs attributable to the whole pole, the cost-allocation formula language would have no purpose or meaning. Any such construction of the term "costs" in section 224(e) that would render the cost-allocation language pointless and thereby yield a telecom rate that is the same as or lower than the cable rate would therefore be contrary to the plain language of the statute and, in any event, unreasonable.

(ii) Section 224(e)(4) expressly contemplates a rate increase for attaching entities that move from the cable rate to the telecom rate.

The express language of section 224(e)(4) confirms that Congress intended the telecom rate formula to result in rate increases relative to the cable rate:

> The regulations required under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any *increase in the rates* for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.[178]

This language shows that Congress anticipated an increase—and certainly not a decrease—in the rate for all existing cable companies providing telecommunications services.[179]

[178] 47 U.S.C. § 224(e)(4) (emphasis added).

[179] The use of the term "any" to modify increase simply recognizes that not all pole attachment rates would increase. Any pole attachments not subject to the telecom rate (i.e., cable attachments used "solely to provide cable service") and any pole attachments newly eligible under section 224 (i.e., non-cable CLECs that had never paid the cable rate) would not be subject to such increase.

(iii) The legislative history of the 1996 Act amendments to section 224 confirms that the telecom rate must be higher than the cable rate.

The Conference Report for the 1996 Act, in reference to pole attachment rates for telecommunications service providers, appears to assume that the telecom formula will result in a rate increase, because it expects that a phase-in will be needed as a matter of course: "Such rates *will* take effect five years from date of enactment and *be phased in over a five year period*."[180]

The legislative history also expressly acknowledges that the cable rate was intended to be "more favorable" (i.e., lower) than the telecom rate. A House Committee report accompanying legislation that ultimately became the basis of the 1996 Act characterized the cable formula as providing "cable companies a more favorable rate for attachment than other telecommunications service providers," and made clear that "[t]he *beneficial* rate to cable companies was established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[181] While Congress intended to provide the more favorable cable rate to an "infant industry," it chose to provide a higher rate for cable companies that have matured to the point of competing in markets for advanced telecommunications services.

b. Under section 224(e), "costs" means the actual costs of the whole pole, duct, conduit, or right-of-way, including capital costs.

The FNPRM asserts that the Commission can adopt a "range of possible interpretations of 'cost' under section 224(e) as yielding a range of permissible rates, from the current application of the telecom rate formula at the higher end of the range, to an alternative

[180] S. Rpt. 104-230, Conference Report Communications Act of 1995 at 206 (February 1, 1996) (emphasis added).

[181] H. Rpt. 104-204 at 91 (emphasis added).

application of the telecom rate formula based on cost causation principles at the lower end."[182] This assertion is premised on a theoretical discussion of the Commission's "overarching duty" under section 224(b) to ensure that rates are just and reasonable. The just and reasonable standard by itself, so the discussion goes, imposes on the Commission no specific methodology, only a constitutional requirement that rates fall within a zone of reasonableness.[183] The Alliance rejects the FNPRM's theoretical, zone-of-reasonableness approach to the interpretation of the term "cost." The constitutional requirements of the just and reasonable standard are not the only limitation on how the standard is applied. The "zone of reasonableness" cannot extend beyond the specific requirements and structure of the statute.[184] In this case, the statute in fact does impose a specific methodology for cost allocation and specifies with reasonable clarity the meaning of the term "costs."

(i) The text and structure of section 224 show that the term "costs" in section 224(e) means the costs of the whole pole, not merely the "additional costs" of providing pole attachments.

The FNPRM acknowledges that sections 224(d) and (e) specify how costs are allocated, but claims that 224(e) does not specify a cost methodology. According to the FNPRM, section 224(e) reference the "cost of providing space" on a pole, but does not define the "cost of

[182] Order and FNPRM at para. 128.

[183] The FNPRM cites its mandate under 224(b) to provide for "just and reasonable" pole attachment rates and explains that the term "just and reasonable" under applicable precedents does not require a specific methodology but only that the regulatory scheme "produces" rates that fall within a "zone of reasonableness." *See* Order and FNPRM at para. 129.

[184] *See, e.g., Pacific Gas and Elec. Co., v. U.S.*, 664 F.2d 1133 (1981) (finding that regulations must be consistent with the statute under whish they are promulgated, an agency's statutory interpretation "cannot supersede the language chosen by Congress." (internal citations omitted)).

providing space."[185] By contrast, "the upper bound for the cable rate under section 224(d) … does identify particular costs to be included." [186]

The text and structure of sections 224(d) and (e) show that the only reasonable interpretation of the term "costs" in 224(e) is the sum of expenses and actual capital costs. In section 224(d), Congress gives the Commission a choice of a lower and upper bound cable rate. At the lower bound, the cable rate is just and reasonable if it "assures the utility the recovery of not less than the *additional* costs of providing pole attachments …."[187] Specifying such "additional costs of providing pole attachments," however, presupposes that there are underlying pole costs not recovered by the utility in cable pole attachment rates. Thus, the lower bound cable rate does not allocate "costs" simply, but only additional (i.e., incremental) costs of providing specific "pole attachments."

By contrast, in section 224(e), there is no such "lower bound" option. Under 224(e), the costs allocated are "the cost of providing space," which are not the same as the "*additional* costs of providing *pole attachments*."[188] The FNPRM takes this term out of context to claim that 224(e) "does not define" such costs. Section 224(e) in fact further specifies that the "cost of providing space" has two components: (1) the "cost of providing space on a pole … other than usable space" and (2) the cost of providing usable space." Section 224(e) not only defines the costs, but allocates all such costs according to a specific allocation provision.

It should be further noted that the lower bound option in 224(d) refers to the additional costs of "providing pole attachments"—the focus is on the attachment. By contrast, 224(e)

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[185] Order and FNPRM at para. 130.

[186] *Id.*

[187] 47 U.S.C. § 224(e) (emphasis added).

[188] *Id.* (emphasis added).

speaks of the costs of "providing space," and makes clear that the sum of the space (both usable and unusable) on the entire pole is the space for which costs being allocated—not merely an attachment. Nothing in section 224(e) suggests that the cost of the entire space of the pole can somehow be reduced to, or equated with, the "additional" costs of providing "pole attachments."

Furthermore, the term "cost of providing space" mean the sum of expenses and capital costs. Section 224(d) specifies that the upper bound cable rate is calculated based on a proportionate allocation of "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." In 224(e), "costs" simply means the costs of the whole pole. Every pole has both operating costs and capital costs. In 224(e), there is simply no need to specify "actual" costs (as opposed to "non-actual" costs?) or "capital" as opposed to "operating" costs. The costs of the pole are what they are: the costs of the pole, not merely the "additional" costs directly attributable to the attachment.

The reason for the greater specificity in 224(d)'s description of costs, relative to the simpler formulation of section 224(e), is straightforward. Because section 224(d) provides for two separate cost methodologies, it was appropriate for Congress to specify the type of costs included. Section 224(d), at its upper bound, refers to the "sum of the operating expense and actual capital costs" attributable to the pole to distinguish from the much narrower "additional costs" measure at the lower bound. By contrast, in section 224(e), there is no need to provide a detailed description of costs because there is no option of limiting "costs" to "additional costs."

(ii) The legislative history shows that Congress intended that the Commission include capital costs in calculating the telecom rate.

The legislative history of section 224(e) confirms that Congress intended that the Commission use a capital cost-based methodology for calculating the telecom rate. As the Commission explained in its Reconsideration Order:

> Since 1978, the Commission has applied an embedded cost methodology, which has been upheld by the United States Supreme Court. The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.[189]

c. The section 224(e) formula provides for an actual pole cost allocation formula, not a cost-causation principle.

The FNPRM's low-end rate proposal is premised on "cost-causation principles" under which "if a customer is causally responsible for the incurrence of a cost, then that customer, the cost causer, pays a rate that covers this cost."[190] There is no statutory basis for limiting the telecom rate's cost basis to costs "caused" by the attaching entity. Whether the attaching entity "causes" the cost of the space on the pole is simply not the statutory criterion for determining the cost basis for the rate calculation.[191] As explained above, section 224(e) provides for allocation of the costs of providing "space" on the whole pole—both usable and unusable space of the pole. Aside from cases where the pole must be replaced to accommodate the new attacher, the cable or CLEC attacher does not "cause" the cost of the space on the pole. Due to ground clearance requirements, the common (i.e., unusable) space —and the costs associated with that space—exists regardless of whether of the presence of a new third-party attacher.

Nevertheless, section 224(e) expressly requires that a specified portion of the costs of such unusable space be divided equally among the attaching entities, regardless of who "caused" that space to be provided in the first place. With regard to the usable space, here again, such

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[189] 2001 Reconsideration Order at para. 22.

[190] Order and FNPRM at para. 134.

[191] Cost causation is relevant only in determining whether certain FERC accounts are included in the maintenance and administrative costs.

space is not necessarily caused by the attaching entity. Regardless of whether the space is created by pole replacement or simply "already there," section 224(e) provides for allocation of the cost of that space. The cost of the pole space itself, not the portion of such costs "caused" by the attaching entity, is the statutorily mandated cost basis for the telecom rate. Accordingly, the proposal to substitute a cost causation principle for actual pole cost exceeds the Commission's statutory authority.

d. Make-ready capital costs are not the same as capital costs included in annual attachment rates.

The FNPRM contrives to exclude capital costs from annual rates, reasoning that all capital costs "caused" by the attacher are already paid for in make-ready:

> [W]e note that if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs. With respect to other capital costs, we believe it is likely that the attacher is the "cost causer" for, at most, a *de minimis* portion of these costs.

Viewed through the narrow lense of cost-causation, the Commission then concludes that "[i]t is likely that most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments."[192]

As explained above, the Commission has no statutory basis for calculating the telecom rate on a "cost causer" basis. Furthermore, as the Commission has repeatedly recognized, annual pole attachment rates properly include an allocation of capital costs other than the capital costs paid "up front" in the (non-recurring) make-ready process.[193]

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[192] Order and FNPRM at para. 135.

[193] In the 2001 Reconsideration Order, the Commission clearly delineates non-recurring capital costs (make-ready for new construction) from recurring capital costs, and confirms that both sets of capital costs are recoverable by the utility under section 224. 2001 Reconsideration Order at fn. 120 and para. 71.

e. Taxes are a legitimate and necessary part of the cost of providing pole attachments

As the FNPRM acknowledges, "[i]ncome taxes are capital costs because they apply to the return equity holders receive for providing funds used to pay for the pole."[194] In calculating the telecom rate under section 224(e), the Commission must include capital costs. The Court in *Texas Power & Light v. FCC* confirmed this requirement: "Congress and the Commission, acting pursuant to its mandate, recognize that tax expenses are a legitimate and necessary part of the cost of providing pole attachments and that such expenses should be taken into account in determining the rates for attaching cable television cables to utility poles."[195] Accordingly, the Commission's proposal to exclude taxes from the calculation of the telecom rate costs is contrary to the requirements of section 224(e).

2. "Reinterpreting" the telecom rate to exclude capital costs would be a radical, unjustified departure from more than three decades of using actual pole costs to calculate pole attachment rates.

An agency that changes course by rescinding an existing rule and replacing it with a substantially different rule must support its decision with reasoned analysis.[196] Specifically, the agency must articulate a rational connection between the facts found and the policy choice made.[197] Also, an agency may not "rel[y] on factors which Congress has not intended it to consider."[198] The Commission's low-end rate proposal fails to meet these requirements. Instead, it represents a radical, arbitrary, and capricious departure from the Commission's existing

[194] Order and FNPRM at fn. 372.

[195] *Texas Power & Light v. FCC*, 784 F.2d 1265, 1270.

[196] *See, e.g., Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, at 42-43 (1983).

[197] *Id.* (*citing, Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, at 168 (1962)).

[198] *Southern Co. v. FCC*, 313 F.3d 574, at 580 (*citing Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, at 43 (1983)).

regulations and from its explanations of those regulations in prior rulemaking orders: the FNPRM fails to provide a reasoned analysis in support of its choice to suddenly exclude capital costs after basing pole attachment rate formulas on capital costs for decades.

a. The low-end rate proposal departs from the Commission's existing regulations.

As the FNPRM acknowledges, the Commission "initially implemented section 224(e) by interpreting 'cost' to include the same cost categories that it was using in the cable rate formula, relying on a fully-distributed cost approach."[199] Excluding capital costs would therefore require a radical revision of the existing rules.

Specifically, section 1.1409(c) provides that the maximum just and reasonable rate must not be "more than an amount determined by the percentage of the total usable space … which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."[200] This general rule applies to both cable rate and telecom rate calculations.[201] If costs were limited to incremental costs, it would make no sense for the regulations to reference net cost and carrying charge.

The Commission's existing rule 1.1404, specifying the information that must be included in a pole attachment complaint, likewise reflects the centrality of capital cost to the

[199] Order and FNRPM at para. 130.

[200] 47 C.F.R. § 1.1409(c).

[201] More specifically, under section 1.1409(c), the basic formula for the "Maximum Rate" is the same for cable and telecom: "Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate." "Net cost" of a bare pole and "carrying charge" are inherently capital cost concepts, as further explained below. *See* 47 C.F.R. § 1.1409(c).

Commission's determination of whether a rate is just and reasonable: "Data and information should be based upon historical or original cost methodology, insofar as possible."[202]

The two rate formulas, which are both inherently based on capital costs, are differentiated only by the formulas used to calculate the space factor. With respect to the telecom formula specifically, existing rule 1.1417 provides for apportionment of the "cost of unusable space."[203] There are no incremental costs associated with "unusable" space. The "unusable" space is, in fact, a fixed amount of space used by all attaching parties equally. If capital costs were excluded, there would be no incremental cost of unusable space to allocate.

By contrast to the Commission's existing rules, which are wholly predicated on a capital-cost-based methodology, the FNPRM's low-end rate methodology would simply eliminate capital costs from the rate calculation. The proposed rule would replace the "carrying charge rate" with a "maintenance and administrative carrying charge rate."[204]

b. The Commission's prior rulemaking orders recognize that the telecom rate includes capital costs.

As the Commission explained in its 2001 Reconsideration Order, it has always applied an embedded (i.e., historical) cost methodology to pole attachment rates and the Commission's "continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations."[205] The Commission's specifically embraces this historical cost methodology with respect to the section 224(e) telecom rate: "while the Commission's pole

[202] 47 C.F.R. § 1.1404(h)(2). Specifically, complaints must include "gross investment by the utility for pole lines," "depreciation reserve from the gross pole line investment," "annual carrying charges attributable to the cost of owning a pole," and the "rate of return authorized for the utility for intrastate service." *See*, 47 C.F.R. §§ 1.1404(g)(1)(i), (g)(1)(iii), (g)(1)(ix), and (g)(1)(x).

[203] 47 C.F.R. §§ 1.1417(a) and (b).

[204] Order and FNPRM at Appendix B, proposed rule 1.1409(e)(2).

[205] 2001 Reconsideration Order at para. 22.

attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996."[206]

The Reconsideration Order also observes that, where Congress wants the Commission to use a different methodology, it expressly directs the Commission to do so:

> By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate of-return regulation. Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."[207]

c. The Commission has always acknowledged that the telecom rate is higher rate than the cable rate.

The Commission has always acknowledged that the telecom rate is a higher rate. In the 1998 Telecom Order, it is assumed and expressly noted that the telecom rate is higher by Congressional design:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.[208]

Furthermore, "[w]e also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate

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[206] *Id.*

[207] *Id.* (*citing* 47 U.S.C. § 252(d)(1)(A)(i)).

[208] 1998 Report and Order at para. 34.

unless the cable operator certifies to the Commission that it is not "offering" telecommunications services."[209]

Earlier, in the 1996 Order, the Commission made clear that the telecom rate provided for an allocation of a greater share of the pole costs under the telecom rate than under the cable rate:

> The new formulas will require that, *in addition* to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way.[210]

Based on this long record of stating the obvious, the Commission cannot now reasonably contend that the telecom rate can be anything other than a higher rate relative to the cable rate.

d. The FNPRM's claim that the low-end approach will be simpler to administer than a cost-based approach, and thereby reduce disputes, contradicts the conclusion reached in prior Commission orders.

The Alliance agrees with the Commission that "to the extent that attachers are, to the greatest extent possible, paying the same rates, this should minimize disputes that have resulted from the Commission's current rate formulas."[211] As explained below, the Alliance's proposal to apply the current, capital-cost-based telecom rate to all Commission-jurisdictional broadband attachers would achieve the goal to reducing rates through rate parity to the maximum extent possible within the Commission's statutory authority. By contrast, the Commission's proposed low-end methodology would likely have the opposite effect by making the telecom formula more—not less—difficult to administer.

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[209] *Id.* at para. 35.

[210] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 96-166, Order at para. 6, FCC 96-327 (1996) (emphasis added).

[211] Order and FNPRM at para. 141.

The FNPRM claims that "simply exclud[ing] capital costs from the pole rental rate rather than perform a detailed cost analysis" to identify capital costs would somehow comport with Congress's intention that the Commission not "'embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates."[212]

However, this conclusion is precisely the opposite of the conclusion the Commission reached in the Reconsideration Order. In that prior order, the Commission endorsed the use of historical cost methodology as a means of *avoiding* the need for the Commission to perform its own detailed cost analysis or embark on its own ratemaking proceeding:

> We have recognized that the continued use of the historical cost based pole attachment formula brings certainty to the regulatory process. For more than two decades, the pole attachment formula has provided a stable and certain regulatory framework, which may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[213]

The FNRPM now proposes to scrap the historical cost-based pole attachment formula, but provides no explanation for how a different formula will achieve the goals that the Commission, in the Reconsideration Order, found were best achieved by the historical cost methodology.

To the extent that the FNPRM's low-end methodology focuses on maintenance and administrative costs that the utility incurs incrementally (i.e., going forward from the time the attachment is made), the low end methodology is analogous to the TELRIC-style forward-looking methodology the Commission considered and definitively rejected in the Reconsideration Order:

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[212] *Id.* at para. 135 (*citing* S. Rpt. No. 95-580 at 23).

[213] 2001 Reconsideration Order at para. 25 (*citing,* S. Rpt. 95-580, at 21(stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation")).

> We have found that switching to a methodology based on forward-looking economic costs would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations. We have acknowledged that, in certain contexts, setting prices on the basis of forward-looking economic costs has advantages, such as giving the appropriate signal for new entrants to invest in network facilities; but, as explained above, these advantages are less pronounced in the pole attachment context because pole attachers are less likely to build, or may be prohibited from building, their own poles and conduit.[214]

Indeed, although it is appropriate to include administrative and maintenance costs in the calculation of the formula, such costs are difficult to identify and allocate on a purely incremental basis. If the entire cost basis of the low-end formula consists of such incremental costs, the Commission will likely need to engage in precisely the "detailed cost analysis" it seeks to avoid. Such an approach would inevitably lead to more, not fewer, disputes over which costs are incremental and which costs are properly attributable to new attachers.

In terms of the basic goals of 224, and Congress's concern for regulatory certainty, the Commission's Reconsideration Order concludes:

> We have concluded and continue to find that, in the context of pole attachments, the continued use of historical costs accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and encouraging negotiation among the parties by providing regulatory certainty. For the reasons stated above, we will continue to calculate maximum pole attachment rates under the Pole Attachment Act using regulatory accounts based on historical costs.[215]

[214] *Id.* at para. 25.

[215] *Id.*

The FNPRM provides no reasoned analysis to justify its 180-degree turn away from the sound reasoning of the Reconsideration Order. The result, if the low-end approach is adopted, will be less regulatory certainty and more disputes.

e. "Cost causation" is not a factor Congress intended the Commission to consider in implementing the telecom rate formula.

A rule is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider."[216] The FNPRM's proposed low-end rate is entirely premised on a "cost causation" methodology. As explained above, section 224(e) provides for an allocation of actual costs, not a cost causation principle. Accordingly, to the extent the low-end rate is based on cost causation as a "factor," it would be arbitrary and capricious and would not withstand judicial scrutiny.

E. The Commission has no authority to "forbear" from applying the telecom rate.

The Commission seeks comment on whether it would be possible for the Commission to "forbear from applying the section 224(e) telecom rate" under its section 10(a) authority.[217] Specifically, the FNPRM asks to what extent the Commission, by forbearing from applying the telecom rate, would be "forbearing from the application of a regulation or statutory provision 'to a telecommunications carrier or telecommunications service' or a class thereof."[218] The FNPRM also asks whether circumstances have differed from what Congress anticipated "in a way that would counsel in favor of forbearance."[219]

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[216] *Southern Co. v. FCC*, 313 F.3d 574, at 580 (*citing Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[217] Order and FNPRM at para. 142.

[218] *Id.* at fn. 384.

[219] *Id*.

The Alliance objects to the suggestion that the Commission can somehow forbear from "applying" the telecom rate to electric utilities as a means to applying a different rate such as the cable rate. As explained in the Alliance companies' reply comments in the VoIP petition proceeding,[220] the statutory forbearance power is a tool for deregulating in order to enable the regulated party to compete, not a means of punishing the regulated party. Forbearance from applying the telecom rate in order to force the utility to accept the lower telecom rate would be a punishment, not a deregulatory boost, for the regulated entity. In any event, the Commission has no authority to exercise forbearance in the case of an electric utility, because an electric utility is not a telecommunications carrier. Properly speaking, even in the case of a utility that is somehow a telecommunications carrier, to forbear from applying 224(e) (a provision for regulation of utilities, not attaching entities) would simply mean that such utility would then be free to charge a market rate for attachments by telecommunications carriers—an outcome the Alliance presumes is not intended by either the Commission or the parties who urge forbearance. Finally, circumstances have not differed from what Congress anticipated in a way that would justify forbearance. On the contrary, precisely as Congress anticipated, cable and other providers of telecommunications services now compete vigorously in markets for voice telephony and a plethora of other telecommunications services.

IV. ILEC ATTACHMENTS

The Alliance understands the Commission's policy goals of promoting broadband competition and deployment. The Alliance, EEI, and other electric utility groups have made

[220] *In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc., (filed October 9, 2009).

numerous filings providing constructive approaches to achieving these goals in a manner consistent with the Commission's statutory authority and with the need to protect the safety and reliability of our nation's critical electric infrastructures.[221] There are, however, limits to what Congress has empowered the Commission to do in regulating pole attachments and there are sound policy reasons for those statutory limits. The Commission should, accordingly, focus on policy proposals that are within it statutory authority to implement and disregard those proposals that are clearly not within its powers. There are few issues regarding the limits of the Commission's jurisdiction, and the soundness of the policy bases for those limits are clearer than in regard to ILEC attachments on electric poles.

The FNPRM states that "the Commission does not propose specific rules in this FNPRM that would alter the Commission's current approach to the regulation of pole attachments by incumbent LECs."[222] The Alliance notes that the Commission's "current approach" to the regulation of ILEC attachments on electric poles is not to regulate them at all. As explained below, and as is expressly reflected in the Commission's regulations, ILECs have no attachment rights under section 224. The Commission could not have stated the matter any more clearly than it did in the 1998 Telecom Order: "*the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[223]

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[221] *See, e.g., In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Comments of the Edison Electric Institute and the Utilities Telecom Council (filed March 7, 2008); *In the Matter of the Petition for Declaratory Ruling That the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Petition of Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc., (filed August 17, 2009).

[222] Order and FNPRM at para. 104.

[223] 1998 Report and Order at para. 5.

Given the express exclusion of ILEC attachers from section 224 and the clarity of the Commission's long-standing approach to the question of ILEC attachments, the Alliance is puzzled that the Commission, citing "the statutory and policy complexities," now "revisits" the issue of regulation of rates paid by ILECs in light of the NBP and asks commenters to "refresh the record" regarding the questions raised in the 2007 Pole Attachment Notice.[224] The statutory issue in question is not particularly complex. It is not so much a matter of interpretation as it one of reading the plain text of the statute. The ILECs, after having acknowledged the exclusion for a decade, attempted to introduce complexity into the matter by making a novel proposal in a 2005 rulemaking petition. Specifically, USTA asked the Commission to reinterpret section 224 to include protections for their attachments on electric poles. Detailed comments filed by the electric industry and the cable industry in response to the petition and to the subsequent Notice confirmed the Commission's established understanding of the plain language of 224. The legal positions explained in these comments were not rebutted by the ILECs. In the end, the Commission did not adopt its proposal to include ILECs in a uniform rated for broadband attachments.

As the Commission, and even the ILECs themselves, have repeatedly acknowledged, ILECs are excluded from the definition of "telecommunications carrier" in section 224 and, accordingly, ILECs have no attachment rights under the statute.[225]

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[224] Order and FNPRM para. 104.

[225] 1998 Report and Order at para. 19 (stating that "[t]he 1996 Act…specifically excluded incumbent local exchange carriers … from the definition of telecommunications carriers with rights as pole attachers."); *see*,*e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Bell Atlantic at 5-6 (filed September 26, 1997) (stating that "the Act defines a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier."); *Implementation of Section 703(e)*

WHEREFORE, THE PREMISES CONSIDERED, the Alliance requests the Federal Communications Commission take action in this proceeding in accordance with the views expressed in these comments.

Respectfully submitted,

/s/ Sean B. Cunningham
Sean B. Cunningham
Hunton & Williams LLP
1900 K Street, N.W.
Washington D.C. 20006
Tel: (202) 955-1500
Fax: (202) 955-2201

Counsel to the Alliance

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of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Comments of SBC Communications Inc., at 21 (filed September 26, 1997) (arguing that ILECs should not be attaching entities indicating that the NPRM in the proceeding noted "that the definition of 'telecommunications carrier' … excludes ILECs and that 'pole attachment' therefore does not include an ILEC attachment and stating that "the plain language of § 224 precludes ILECs from being treated as attaching entities."); *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Comments of Ameritech at 11 (filed September 26, 1997) (stating that "[t]he plain language of Section 224(e)(1), coupled with the definition of 'attachment' in Section 224(a)(4) and the exclusion of the ILEC from the definition of 'telecommunications carrier' for purposes of Section 224 requires that ILECs should not be counted as attaching parties.").